University of Alberta

The Open Courts Principle and the Internet: Transparency of the Judicial Process Promoted by the Use of Technology and a Solution for a Reasoned Access to Court Records

by

Marc-Aurèle Racicot

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Canada

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.

Jeremy Bentham

'Constitutional Code, Book II, ch. XII, sect. XIV.' *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols., (Edinburgh: Tait, 1843) vol. ix, p. 493.

Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

Jeremy Bentham

'Draught of a New Plan for the Organization of the Judicial Establishment in France.' *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols., (Edinburgh: Tait, 1843) vol. iv, p. 316.

Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity.

Lord Acton and His Circle 166

(Abbot Gasquet ed., Burt Frankin 1968) (1906).

In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.

Fish J.

Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188 at para. 1.

To My Wife, Raluca

Abstract

The justice system has worked, to date, under conditions of practical obscurity, but now that technology affords us easier and better access to court information, why would we consider that limiting access will make the justice system better? New technologies are only tools available for the citizenry to access information.

The Canadian Judicial Council 2005 Protocol and Policy, recognize the importance of the open courts principle, but propose unprecedented limitations to the inclusion of information that was until now available in judgments, court records and dockets.

I will demonstrate that the open courts principle is not to be pushed aside without proper testing based on solid criteria which is to be conducted on a case by case basis, on an approach which is not statutory or policy driven, and which is flexible and leaves the judge in control of the judicial process.

Special thanks to Mr. Alan Leadbeater, Mr. Dan Dupuis, Dr. Edward C. LeSage, Mrs. Linda Harkins and to my supervisor Professor Wayne Renke.

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Chapter I. Introduction

Have you ever browsed the Federal Court's decisions and discovered that some published versions are 'public versions'?[1] Have you ever been asked to leave a courtroom because the current portion of the proceedings was to be heard 'in camera'? Have you ever searched through a court docket only to find that all parties' affidavits and memoranda have been sealed? Have your suspicions towards the judicial system ever been aroused when you observe that the court has omitted the names of involved parties or some relevant facts that have been deemed too confidential or sensitive to be included in the judgment? Have you ever thought that access to court records should be simplified? Have you ever felt that the government, large organizations or VIP's have access to a special kind of justice behind closed doors?

Recent judicial practices impairing or blocking access to judicial information appear to run afoul of the open courts principle, the general rule – entailed by the rule of law – that judicial proceedings should be open. When the administration of justice is not open, accessible and transparent we feel that something within the system has gone wrong. While concerns have been raised that open justice may cause unwarranted intrusions on the private sphere of individuals, we must examine whether these concerns result from a misunderstanding of legal tradition

[1] For example see *Abbott Laboratories v. Canada (Minister of Health)*, 2005 FC 1095.

or from the misinterpretation and application of privacy legislation and use of technology.

The rule of law and the principle of openness which flows from it are at the foundation of our system of justice. The rule of law is an element of political morality.[2] DeCoste explained that the end of the rule of law:

> is the good of the governed, of the people who are the constituents of political community. In consequence, a Rule of Law state is a moral agent, whose legitimacy depends upon its acting for the good of the people subject to its rule.[3]

The rule of law requires separation of powers and a body of public rules which confers rights which constrain public and private power.[4] Raz and Fuller both stated the rule of law also requires that rules be promulgated (i.e. publicly accessible).[5] Murphy wrote "Publicity of laws ensures citizens know what the law requires."[6]

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[2] Frederick C. DeCoste, *On Coming To Law: An Introduction to Law in Liberal Societies* (Markham: Butterworths, 2001) at 159.

[3] *Ibid.* at 159-160. See also Jeremy Waldron, "The Concept and the Rule of Law", paper prepared for the Second Congress on the Philosophy of Law, Institute of Law Research, Mexico City, March 27-31, 2006. Waldron wrote:
"The Rule of Law celebrates features of a well-functioning system of government such as publicity and transparency in public administration, the generality and prospectivity of the norms that are enforced in society, the predictability of the social environment that these norms help to shape, the procedural fairness involved in their administration, the independence and incorruptibility of the judiciary, and so on."

[4] *Ibid.* at 163, 170.

The rule of law involves (in part) governance through rules. Rules are independent of what people think of rules or say about rules. In this sense, rules are "inherently" public, rather than private – openness is implicit in the very notion of a rule. In our judicial system, judges are to apply rules, but how can we be sure judges actually are applying rules, or whether they are just applying their own prejudices or whims? One means of ensuring rules are applied is to impose some scrutiny on the courts. One means of imposing scrutiny is through making proceedings public. We then can see whether the judges are in fact applying the rules.[7]

The open courts principle must not be trivialized; in other words, the rule must not become the exception. The open courts principle is threatened by two linked

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[5] Lon Fuller, *Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) at 39, and Joseph Raz, "The Rule of Law and Its Virtue", in Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1970), cited in Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law" (2005) Law and Philosophy 24:239 at 240.

[6] *Ibid.* at 240.

[7] See Daniel C. Préfontaine and Joanne Lee, "The Rule of Law and the Independence of the Judiciary", paper prepared for the World Conference on the Universal Declaration of Human Rights, December 1998, at 13, online: <www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw.pdf>. Préfontaine and Lee wrote: "[...] judges are bound by the rule of law. They must decide cases in accordance with the evidence before them and the law. With the exception of the highest appellate level, the judgments of all trials courts and appeal courts as well as the manner in which the proceedings have been conducted by them are subject of appeal and, if warranted, correction or modification by the court of appeal. All judicial proceedings are conducted in open court, under the scrutiny of the bar, the public and the press. The reasoning of judicial decisions and the conduct of proceedings are subject to critism by courts of appeal, by other judges, the legal profession, academics, and by the press and the public."

developments, changes in technology and technology's effect on the public's concern with privacy.

As our command of electronic communication and media has evolved, new technologies have forever changed our way of life. Most dramatic of these new developments is the impact on the flow of information. From the first urgent messages carried by horse or pigeon, to the heavy parchment sealed with wax, to the first radio transmission, to the first television broadcast, and to the first e-mail, we have made great strides in facilitating our ability to communicate with one another. Justice, however, has often remained a mystery to the public.

Until recently, the only way to obtain information regarding a court docket or court file was to go in person to the courthouse. Technology has changed that. In the 1980's, court administrations started to use internal computer based systems to store information. Access to this information (court records, docket information) was limited to individuals within the courthouse, so while the information was available, accessibility problems such as location and cost of travel made it only relatively public; the expression 'practical obscurity' perhaps best defines that situation. Nevertheless, the world is becoming an ever smaller place and the increased ability to access information threatens to overcome practical obscurity. I note that judgments and decisions have been generally well-publicized in electronic format (e.g. Quicklaw, Soquij) and in a common law system, the

decisions must be public.[8] Now other court records have become, at least in theory, equally accessible in electronic format.

The possibility and actuality of enhanced access to court records have generated privacy concerns. In 2003, the The Right Honourable McLachlin, in a speech titled "Courts, Transparency and Public Confidence – To the Better Administration of Justice", recognized that "the technological advances of recent decades have put new pressures on the open court principle and have created new dilemmas for the courts, the media and the public."[9] Concern over the use of technology potentially creating enhanced access to court information is not limited to Canada. In the United States, five focus groups were conducted by Ward Research in Hawaii in 2003. The objective of the research was to explore the perceptions of "openness" in the courts. In the Final Report it is mentioned that:

> It is clear that residents do not favor making case records available on the Internet, based on responses to "Should the system facilitate access by making case information available on the Internet?" Many were

[8] Elizabeth F. Judge, "Canada's Courts Online: Privacy, Public Access and Electronic Court Records" (paper presented at Dialogues about Justice: The Public, Legislators, Courts and the Media, October 17-19, 2002) at 4; Canadian Judicial Council, "Discussion Paper on Open Courts, Electronic Access to Court Records and Privacy", prepared on behalf of the Judges Technology Advisory Committee, May 2003 at paras. 55-57, online: <www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>. [CJC, "Discussion"].

[9] Beverly McLachlin, Courts, Transparency and Public Confidence – To the Better Administration of Justice, [2003] Deakin Law Review 1, online: <www.austlii.edu.au/au/journals/DeakinLRev/2003/1.html>.

> uncomfortable knowing that detailed case records were already available in hard copy form at the courts.
> [...]
> The public generally opposes making case records of divorce and family matters easily available on the Internet. The general consensus here is that issues of privacy outweigh considerations of access.[10]

Additional pressure for more secrecy in the justice system comes from national security concerns. In the aftermath of the terrorist attacks of September 11, 2001, the United States government detained many individuals and under the auspices of national security the U.S. government refused to make public any details about the identities or the number of detainees.[11] "As a complement to its use of secret detentions of alleged immigration-law violators, the government also moved to impose secrecy on deportation proceedings."[12]

The number of arguments used to justify more secrecy – technology, privacy and national security – is adding up, as we can see from a 2006 article published in the Canadian Bar Association's *National*:

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[10] Ward Research, "Openness in the Courts: A Final Report of Responses of Focus Groups from Members of the Bench, Bar, Media and General Public", prepared for The Judiciary State of Hawaii, July 2003, online: <http://www.courts.state.hi.us/attachment/4D44FE74F4DF1267F34A9452DD/WRreport_combined.pdf>.
See also Anne Wallace and Karen Gottlieb, "Courts Online – Privacy and Public Access in Australian and United States' Courts" (paper presented at the National Centre for State Courts Court Technology Conference, August 2001, Baltimore, Maryland), online: <www.ctc8.net/showarticle.asp?id=23>.

[11] Secret Detentions and Deportations, online: <www.bushsecrecy.org/print_page.cfm?PagesID=36>.

[12] *Ibid.*

> New technologies are revolutionizing courtrooms across the country, while around the world, legal minds are grappling with a vital question: how can we make the most of this new technology without compromising the security, privacy and integrity of the judicial process in a "wired" world? [...] Across Canada, courts are feeling their way into the high-tech world, drawn by the potential savings in time, money and storage and responding to demands for greater access to legal proceedings and court records.[13]

Questioning the need for an open justice system is not a new topic of debate, but as the proponents of secrecy become ever more vocal the possibility of losing this principle looms as an actuality.

How can this gap between perception and principle be bridged? The resolution of the conflict between privacy interests and openness interests cannot be accomplished through general freedom of information and protection of privacy (FOIPP) legislation because judicial information is largely, if not completely, excluded. In Canada, since the adoption of the first freedom of information legislation by Nova Scotia in 1977, court records have always been excluded from the ambit of the legislation. None of the provincial or federal legislation applies to the courts, at least as their judicial functions, as opposed to their administrative functions, are concerned.[14] There is either a specific provision excluding the

---

[13] Amy Jo Ehman, "E-Justice for All", CBA's *National*, 15:1 (January/February 2006) at 45-47.

[14] Colin H.H. McNairn and Christopher D. Woodbury, *Government Information: Access and Privacy*, loose-leaf (Toronto: Thomson-Carswell) at 2-9: "The Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan Acts state explicitly that the courts are not government institutions for the purposes of the Act or that the Act does not

courts from the application of the Acts or no mention made at all.[15] When FOIPP legislation was adopted, court records were considered to already be publicly available. In the United Kingdom, courts were excluded from the ambit of the *Freedom of Information Act* because:

> Rules of court already provide a comprehensive code governing the disclosure of court records and documents served in the course of proceedings. For certain types of proceedings only limited classes of persons may have access to court documents due to the sensitivity of the issues involved (for example, in family proceedings there is a need to protect the identity of any children involved). It was not the intention that the FOI Act should provide indirect access to these court records; the greater public interest was considered to lie in the preservation of the courts' own procedures for considering disclosure. This exemption therefore ensures that the courts can continue to control the disclosure of that information in the proper exercise of their jurisdiction.[16] [underlining added]

Judges have been left to develop their own responses to the conflict and hence, a variety of judicial responses have developed. Here and there, court administrations across North America have adopted policies or rules to limit the openness principle, resulting in the emergence of practices such as anonymization

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apply to court records. No courts appear in the catalogue of institutions to which the remaining Acts apply. However, records relating to the administration of the court system are likely to be accessible in all jurisdictions through the justice or attorney general's department. The accessibility of court administration records is made explicit in the Alberta, British Columbia, Nova Scotia and Prince Edward Island Acts."
See also Judge, *supra* note 8.

[15] For example: Alberta *Freedom of Information and Privacy Act*, R.S.A. 2000, c. F-25, s. 4(1)(a).

[16] Department of Constitutional Affairs, FOI Full Exemptions Guidance, United Kingdom, online: <http://www.dca.gov.uk/foi/guidance/exguide/sec32/chap02.htm>.

of courts' decisions, access on a need to know basis, confidential filing, confidentiality orders, and severing of information.[17] Since the mid-1990's the province of Quebec has had rules of practice which provide for the de-identification[18] of decisions in family cases.[19] In 2005, hoping to standardize and

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[17] In the United States, some have suggested that courts should look for inspiration to the models established by the freedom of information and privacy legislation to address the balance between concerns for individual privacy and the right to access information. See Wallace, *supra* note 10. See also Allison Stanfield, "Cyber Courts: Using the Internet to Assist Court Processes", Queensland Law Foundation Technology Services Pty. Ltd, (Paper presented to WWW7, April 1998), online: <http://members.ozemail.com.au/~astan/cyber_courts.htm>.

Discussions around public access to court records seem quite lively in the United States; there is even an information clearinghouse on the topic. Jaimi Dowdell, "Welcome to the information age: Electronic court records and information access", November 21, 2003, online: <http://foi.missouri.edu/controls/dowdell.doc>, <www.courtaccess.org/indexpage_x.htm>. See also *Chicago-Kent Law Review*, Volume 81:2 (2006) which presents a series of papers presented at the Syposium: Secrecy in Litigation, online: <http://lawreview.kentlaw.edu/Contents_81-2.html>.

Martha Wade Steketee and Alan Carlson, "Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts", State Justice Institute, October 18, 2002, online: <www.courtaccess.org/modelpolicy/>:
"On August 1st, 2002, the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) agreed to endorse the "Public Access to Court Records: Guidelines for Policy Development by State Courts". The CCJ/COSCA Guidelines proposed are based on the following premises:

- Retain the traditional policy that court records are presumptively open to public access;
- As a general rule access should not change depending upon whether the court record is in paper or electronic form. Whether there should be access should be the same regardless of the form of the record, although the manner of access may very. The CCJ/COSCA Guidelines apply to all court records;
- The nature of certain information in some court records, however, is such that remote public access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained;
- The nature of the information in some records is such that all public access to the information should be precluded, unless authorized by a judge;
- Access policies should be clear, consistently applied, and not subject to interpretation by individual court or clerk personnel."

[18] De-identification: the names of the parties are removed or the first initials are used. For example, John Doe v. Jane Doe will be titled J.D. v. J.D.

[19] Canadian Bar Association, "Submission on the Discussion Paper: Open Courts, Electronic Access to Court Records, and Privacy", April 2004 at 13, online: <www.cba.org/CBA/submissions/pdf/04-13-eng.pdf>.

provide guidance over the development of the practices in Canada, the Canadian Judicial Council (hereinafter "CJC") approved and adopted a *Use of Personal Information in Judgments and Recommended Protocol* [20] (the "Protocol") and a *Model Policy for Access to Court Records in Canada* [21] (the "Policy").

I will demonstrate that the 2005 CJC documents proposing or acknowledging the need to restrict access to court records are improper, because: (a) the openness of the court system is important; (b) electronic communication (Internet) allows enhanced access to information in the court systems, specifically to court records; (c) while court records, pre-Internet, were not widely accessible (they were protected by "practical obscurity"), that obscurity should not be preserved. The general approach should be that court records should be available to the public through the Internet. There are exceptional cases where information should not be disclosed and there is a test and a process by which disclosure vs. non-disclosure can be sorted out.

I argue that administrative policies should not guide the judiciary on issues of access to court records. Only a proper discretionary test performed by a judge, on

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[20] Canadian Judicial Council, "Use of Personal Information in Judgments and Recommended Protocol", prepared by the Judges' Technology Advisory Committee, March 2005, online: <www.cjc-ccm.gc.ca>. [CJC, "Protocol"]

[21] Canadian Judicial Council, "Model Policy for Access to Court Records in Canada", prepared by the Judges' Technology Advisory Committee, September 2005, online: <www.cjc-ccm.gc.ca>. [CJC, "Policy"]

a case by case basis in the course of litigation, should be used to permit secrecy in the administration of justice.

I propose to review the principle of open justice by: looking at its source, concepts and justifications; examining the nature of privacy involved in the judicial context; reviewing the Canadian context in which the conflict between access to and secrecy of court records is emerging; and by trying to identify the proper notion of privacy as it relates to the administration of justice. I will then suggest a solution to balance the open courts principle (openness) with the need for confidentiality, whether it be in operations within the courtroom or to protect actors involved in the judicial system. Finally, I will evaluate the CJC's 2005 Protocol and Policy in light of my proposed solution.[22]

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[22] CJC, "Discussion", *supra* note 8 at paras. 5, 88, 116. Some terms and definitions found in the 2003 CJC Discussion Paper and later used in the 2005 Policy and Protocol which shall appear below:

> **"Court record** – is used to include pleadings, orders, affidavits etc; that is to say, documents created by the parties, their counsel, or a judicial official or his/her designate.
> **Docket information** – is used to include documents prepared manually by court staff or automatically by data entered into a computer such as a listing of court records in a court file.
> **Court file** – includes both of the above bearing in mind that some docket information will not be physically in the court file but resides in ledgers or data bases.
> **E-filing** – include the transmission, service and storage of information in electronic form whether the information is sent and received is a way in which it can automatically populate the court's data base or whether information is manually entered into the court's data base.
> **Practical obscurity** – refers to the inaccessibility of individual pieces of information or documents created, filed and stored using traditional paper methods relative to the accessibility of information contained in or documents referred to in a computerized compilation.
> **Anonymization** – use of initials or pseudonyms in the style of cause and in the reasons instead of full names of parties."

Chapter II. The Open Court Principle

"Justice must not only be done, but must be seen to be done" is not just a common catchphrase; it is the very heart of our justice system. To understand the importance, necessity and soundness of the principle, I will elaborate on the open courts principle, consider its history, and discuss its justification in Canadian law.

A. The Principle Defined

What is the "open justice principle"? J J Spigelman, Chief Justice of New South Wales, defined the principle as follows:

> [...] one of the most pervasive axioms of the administration of justice in our legal system. It informs and energises the most fundamental aspects of our procedure and is the origin, in whole or in part, of numerous substantive rules. It operates subject only to the overriding obligation of a court to deliver justice according to law.[23]

We can try to explicate the principle by looking at the rules and characteristics of the judicial process in which the open court principle is reflected. Chief Justice Spigelman drew the following list:

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[23] J J Spigelman C.J., "Seen to be done: The Principle of Open Justice" (keynote address to the 31st Australian Legal Convention, Canberra, October 9, 1999) at 4. See also Sprigelman J., 'Seen to be done: The principle of open justice – Part I' (2000) 74 Australian Law Journal 290; Sprigelman J., 'Seen to be done: The principle of open justice – Part II' (2000) 74 Australian Law Journal 378.

(i) The fundamental rule is that judicial proceedings must be conducted in an open court, to which the public and the press have access.[24]

(ii) The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.

(iii) The principle informs the determination of whether a function conferred on a judicial officer is incompatible with the office, under the separation of powers in the Constitution.

(iv) The guarantee of judicial impartiality by the disqualification for bias of a judicial officer, is determined by a test of what fair minded people – not just the parties, but the public – might reasonably apprehend or suspect.

(v) The rule of natural justice – the obligation to accord procedural fairness by way of a hearing – is in part based on the importance of appearances.

(vi) The power of a court to prevent abuse of process is also based in part on the need to maintain public confidence in the administration of justice.

(vii) The operation of various principles designed to ensure the fairness of a trial is based on appearances: for example, the prohibition of undue interference by a judge and of improper conduct by a court officer; or the obligation of a judge when sitting without a jury to enunciate any warning that he or she would have to give to a jury.[25]

(viii) Open justice also serves the important function that victims of crime, and the community generally, may understand the reasons for criminal sentences.

(ix) Open justice affects the weight to be given to the public interest in the determination of claims of privilege.

(x) The public interest in the appearance of justice in part explains the reluctance to order a stay of criminal proceedings.

(xi) The role of legal practitioners as officers of the Court creates a public interest to restrain a legal practitioner from acting against a former client, which is also reflected in skepticism about the efficacy of 'Chinese walls'.[26]

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[24] A court may not even agree to hear a case in camera by consent (*Scott v. Scott*, [1913] AC 417 at 436, 481).

[25] The jury is one aspect that will not be discuss in the research [illegible] ems to be an element related to the open courts principle. We have seen, in the last 50 years, a diminution in the use of jury, particularly in civil proceedings, while it is still available for some criminal trials. This is another interesting issue, which by itself may be the topic for later study.

[26] Spigelman, *supra* note 23 at 10-14.

For Joseph Jaconelli, the first element listed by Justice Spigelmen constitutes the very core of the idea of open justice. Jaconelli enumerated additional aspects of open justice[27]:

(1) The right of those in attendance to report the proceedings to those who either could not gain admission to the trial or were simply not inclined to attend.
(2) When documents have come into existence for the purposes of the trial, these should presumptively be available for inspection by any member of the public.
(3) The names should be openly available of the personnel of the trial: the accused (in a criminal case), the parties (in a civil case), judge, jurors and witnesses.
(4) The trial is to take place in the presence of the accused.
(5) The accused is presumptively entitled to confront his accusers.

These two lists demonstrate the quasi-omnipresence of the open courts principle in the administration of justice.

Jaconelli enumerated the elements of a trial: Place, Time and Function.[28] 'Open Court' means a Court to which the public have a right to be admitted, but does not require that any member of the public actually be present.[29] Jaconelli quoted I. H.

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[27] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (New York: Oxford University Press, 2002) at 2-4.

[28] *Ibid.* at 11-15.

[29] *Ibid.* at 21.

Jacob, who identified the principle of 'publicity', together with those of 'orality' and 'immediacy', as the three traditional facets of the English civil trial:

> The principle [orality] dominates the conduct of civil proceedings at all stages both at first instance, before and at the trial, and on appeal, and in all courts both superior and inferior as well as in tribunals...Even in instances where written material is produced to the court, as where written pleadings or other documents such as affidavit evidence or the correspondence between the parties, are referred to..., the actual hearing of the proceedings in court is conducted orally: there is the oral reading of the relevant written material, the oral arguments, the oral exchanges between the court and the lawyers..., the oral evidence at the trial, the oral judgment of the court.[30]

Jaconelli noted that orality has consequences both external and internal to the trial process. External to the trial, it means that '[f]rom beginning to end, the intelligent listener can follow everything'. Internally, "it advances the principle of 'immediacy', whereby a 'direct, immediate and dialectical investigation in to the relevant facts and the applicable law' is conducted which promotes conditions favourable to the reaching of a correct decision."[31]

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[30] *Ibid.* at 29. In *Garnett Co. v. DePasquale* (1979) 443 U.S. 368, 420-421, Blackmun J. touched this aspect by citing T. Smith, De Republica Anglorum 101 (Alston ed. 1972): "[...] the unbroken tradition of the English common law was that criminal trials were conducted "openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide.""

[31] *Ibid.* at 29, 33: "The courts seem to have recognized that there is a clear conceptual distinction between the idea of natural justice and that of open justice. Hence, it could be argued that there is no a breach of the rules of natural justice when members of the public are excluded from the court room. Similarly: "[...] the administration of justice would be rendered impracticable by [the] presence [of the public], whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court." *Scott v. Scott* [1913] AC 417, 446.

Decisions are based on evidence that is immediate, public and that can be heard and seen by everyone at a given moment. Decisions are not influenced by earlier or later secret evidence. In other words, orality (one speaks out loud, so others may hear) and immediacy (what everyone hears at a given time) have a tight link to publicity: the public in attendance at the courthouse will hear and have direct knowledge of all the facts presented at one specific given time and on which the judge will base his/her decision. In contrast, a non-oral/documentary system may be perceived as not having tight link to publicity unless there is access to the information contained in the records.

In *Vancouver Sun (Re)*[32], the Supreme Court of Canada clearly enunciated the importance of the principle and added it had emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings.[33]

However, Jaconelli recognizes that a legal system which persistently denies to its subjects the basic requirements of natural justice is unlikely to be scrupulous in requiring that judicial business be transacted in public (at 34-45).

[32] *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332.

[33] *Ibid.* at para. 23.

B. The Principle's History

That trials are to be held in public is a principle that has long been formally recognized in constitutional and human rights texts, whether national or international, contemporary or historical.[34]

Jamie Cameron wrote:

> As Earl Loreburn explained, "[t]he inveterate rule is that justice shall be administered in open court"; the traditional law, "that English justice must be administered openly in the face of all men", he described as "an almost priceless inheritance." For his part, Lord Atkinson acknowledged that the hearing of a case in public may be "painful, humiliating, or deterrent both to parties and witnesses", and that in many cases, especially those of a criminal nature, "the details may be so indecent as to tend to injure public morals". He concluded, nonetheless, that "all this is tolerated and endured", because a public trial is "the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect.[35]

The principle has also been qualified by the Supreme Court of Canada as a cornerstone of the common law.[36] In its report titled *Access to Court Records*, the Law Commission of New Zealand wrote "the principle of open courts is adopted

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[34] Jaconelli, *supra* note 27 at 5. Jaconelli notes that (at 9)"*Scott v. Scott*, [1913] AC 417 was authority only on the lack of power, at common law, and even with the consent of the parties, to direct the trial in camera of a nullity suit in the interests of public decency.".

[35] Jamie Cameron, *Victim Privacy and the Open Court Principle*, Department of Justice Canada, March 2003 at 9. [Cameron, "Victim"].

[36] *Vancouver Sun*, *supra* note 32 at para. 24.

in many jurisdictions and has been affirmed in the International Convention on Civil and Political Rights, art. 14(1)."[37]

In the United States of America, in *Nixon v. Warner Communications, Inc.*, the Court held that there is a common law right "to inspect and copy public records and documents, including records and documents".[38]

In *Gannett v. DePasquale*[39], the US Supreme Court had to decide if the public has access to pretrial proceedings. The Court held that "The history of the Sixth Amendment's public-trial guarantee demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings, not a constitutional right of members of the general public to attend a criminal trial."[40] Justice Blackmun, dissenting in part, conducted a study of the English common law heritage. He found "heritage reveals that the tradition of conducting the proceedings in public came about as an inescapable concomitant of trial by jury, quite unrelated to the rights of the accused, and that the practice at common law was to conduct proceedings in public."[41] In light of the history, he concluded "it

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[37] Law Commission of New Zealand, "Access to Court Records", Report 93 (June 2006) at 39, online: <www.lawcom.govt.nz>.

[38] *Nixon v. Warner Communications, Inc.* (1978), 435 U.S. 589.

[39] *Gannett Co.*, *supra* note 30.

[40] *Ibid.* (syllabus).

[41] *Ibid.* at 418-419.

is most doubtful that the tradition of publicity ever was associated with the rights of the accused. The practice of conducting the trial in public was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights."[42]

The following year in *Richmond Newspapers v. Virginia*[43], the US Supreme Court was again writing on openness. This case originated in an appeal from a State trial judge's order, at the request of the accused, closing the murder trial to the public and the media. Chief Justice Burger retraced the historical evidence of the evolution of the criminal trial in Anglo-American justice,[44] and in its decision, the

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[42] *Ibid.* at 421.

[43] *Richmond Newspapers v. Virginia* (1980), 448 U.S. 555.

[44] *Ibid.* at 564-568: "The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. [...] Somewhat like modern jury duty, attendance to these early meetings was compulsory on the part of the freemen. [...] With the gradual evolution of the jury system in the years after the Norman Conquest, the duty of all freemen to attend trials to render judgment was relaxed, but there is no indication that criminal trials did not remain public. [...] Although there appear to be few contemporary statements on the subject, report of the Eyre of Kent, a general court held in 1313-1314, evince a recognition of the importance of public attendance apart from the "jury duty" aspect. It was explained that:

> "the King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; and for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare."

[...] From these early times, although great changes in courts and procedure took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided. [...] We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," *Baubney v. Cooper*, 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K.B. 1829), was not also an attribute of the judicial systems of colonial America."

U.S. Supreme Court relied on tradition to conclude "the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments.[45] The Court stated:

> Civilized societies withdraw both from victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner".[46]

Through the years, despite some level of rhetoric (as Cameron put it), the common law's commitment to open court has yielded a variety of exceptions from the rule.[47] If this principle has survived all these years, it is because it is justified. I will now address the principle's justifications.

C. Principle's Justifications

In a 1987 Working Paper titled "Public and Media Access to the Criminal Process", the Law Reform Commission of Canada wrote that "the tradition of public access to, and freedom of communication about, criminal proceedings was

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[45] Robert Gellman, "Public Records: Access, Privacy and Public Policy", a discussion paper prepared for the Centre for Democracy & Technology, May 16, 1995, online: <www.cdt.org/privacy/pubrecs/pubrec.html>.

[46] *Richmond Newspapers, supra* note 43 at 571.

[47] Cameron, "Victim", *supra* note 35 at 7.

not preceded by any conscious recognition of the benefits that openness might afford."[48] For the Commission, "openness was simply characteristic of the way justice was carried out"[49] and "justifications for the principle followed, rather than preceded, its genesis as an integral part of the early trial process."[50] I add that the unconscious development of principles is typical in the common law system.

The Commission concluded that:

> [...] the open quality of our legal system does not have its origins in any deliberate campaign to gain access to closed courtrooms. Rather, "[i]t was simply the English way of doing justice". The concept of openness in the administration of justice, then, has more tradition in it than ideology, despite the compatibility of the idea with liberal democratic thought.[51]

While the Law Reform Commission's conclusions are historically accurate, I am also of the opinion that the tradition of public access has been scrupulously

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[48] Law Reform Commission of Canada, *Public and Media Access to the Criminal Process*, Working Paper 56, 1987 at 14. A year prior to the release of the Law Reform Commission's Paper, Philip Anisman and Allen M. Linden published a book titled "The Media, the courts and the Charter", the book was intended to "provide an intensive consideration of the implications of the "freedom of the press and other media of communication" guaranteed by the *Charter* for the media themselves, for the judicial process and for Canada generally at a relatively early stage in the Charter's development." The papers and comments presented in the book were originally delivered as an Osgoode Hall Law School Annual Lecture Series at York University in March 1985 which was funded in part by the Law Reform Commission of Canada. Philip Anisman and Allen M. Linden, *The Media, the courts and the Charter*, (Toronto: Carswell, 1986), p. v-vi.

[49] *Ibid.*

[50] *Ibid.*

[51] *Ibid.* at 15.

followed all these years because there are two proven valid sets of justifications for it, public policy justifications and constitutional justifications.

1. Public Policy Justifications

There are five main public policy justifications supporting the open court principle: (a.) public education; (b.) judicial accountability; (c.) check on perjury; (d.) respect for the administration of justice; and (e.) promoting search for truth.

a) Public education

The open court principle plays an important role in educating the public. It allows citizens to see their justice in action by permitting ready access to the courts and their proceedings.

For Jamie Cameron, an open court provides "a place where men learn about justice."[52] Ten years later, Robert Gellman echoed the opinion of Cameron. In his summary of the *Richmond Newspapers v. Virginia*[53] decision, Gellman also referred to the educative benefit of having open hearings:

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[52] Jamie Cameron, "The Rationales for Openness in Judicial Proceedings and the Rationales for Placing Limits on the Principle of Openness", research paper prepared for the Law Reform Commission of Canada, September 1985, at 8. [Cameron, "Rationales"]

[53] *Richmond Newspapers, supra* note 43.

> The Court found that public nature of criminal trials served the public purpose of administering justice. The reasons for access to criminal trials varied, but openness, fairness, the perception of fairness, and confidence in the governmental process are central. The Court found that secrecy would undermine the significant therapeutic value and educative effect that communities derive from the open administration of justice. Nothing in the opinion suggests that the privacy rights of defendants or witnesses justify the closing of trials. Criminal trials are public *events*.[54]

In Canada, twenty years after *Richmond*, McLachlin C.J. stated that the principle "assists in the search for truth, and is essential to the effective exercise of the right to free expression and freedom of the press. By permitting access to and dissemination of accurate information, [the open court principle] plays an important role in educating the public."[55] She added "since openness permits the community to see that justice is done, it has a therapeutic function."[56]

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[54] Gellman, *supra* note 45; *Richmond Newspapers*, *supra* note 43: "Justified originally by common-law traditions predating the enactment of our Constitution, the right of access belonging to the press and the general public also has a First Amendment basis. Neither the common-law nor the constitutional right is absolute. More general in its contours, the common-law right of access establishes that court files and documents should be open to the public unless the court finds that its records are being used for improper purposes. The First Amendment presumes that there is a right of access to proceedings and documents which have "historically been open to the public" and where the disclosure of which would serve a significant role in the functioning of the process in question. This presumption is rebuttable upon demonstration that suppression "is essential to preserve higher values and is narrowly tailored to serve that interest." The difficulties inherent in quantifying the First Amendment interests at issue require that we be firmly convinced that disclosure is inappropriate before arriving at a decision limiting access. Any doubts must be resolved in favor of disclosure."

[55] McLachlin, *supra* note 9.

[56] *Ibid.*

This justification could seem to be rhetorical because on most occasions citizens are interested only in front-page news cases and citizens often critique the process instead of trying to understand the reasoning which led to a particular decision. 'That justice be done' could also be questioned when we take into consideration that there is a selective disclosure by the media. About 99.9% of cases receive no media coverage.

Nonetheless, these days informed citizens want to know what is happening. They want to see the ritual of trial. The point seems to be less to provide "education" than to provide the experience of justice. Coming back to Burger C.J.'s remarks in *Richmond Newspapers*, for justice to have a cleansing effect on the community it must be conducted in public.[57] There is no reason to suppose that in another quarter century that the public will no longer seek nor require the therapeutic function or educative effect of open justice.

b) Judicial accountability

Public access promotes judicial accountability. The eyes and ears of the public insure that the decisions of the courts are not influenced by earlier or later secret

[57] *Richmond Newspapers, supra* note 43 at 571. The U.S. Supreme Court probably has it right – even if there isn't too much education – we still want to see justice done. This is not "therapy" it is probably more like a means of slaking our thirst for vengeance. It is more a sublimation or displacement than a cure.

evidence. As described below, decisions must be based on evidence that is immediate at one given moment. For McLachlin C.J., "openness enhances judicial accountability."[58] The principle is also said to be a safeguard against 'misdecision', however, because of judicial independence, the judiciary is only visible to the public but not responsible to the public.[59]

The informed public is the supervisor of justice. In the *Vancouver Sun* decision, the Supreme Court mentioned "Public access to the courts guarantees the integrity of judicial processes by demonstrating 'that justice is administered in a non-arbitrary manner, according to the rule of law'"[60], and that "[o]penness is necessary to maintain the independence and impartiality of courts."[61]

The Law Reform Commission of Canada explained:

> In a democratic society, the public must have a full opportunity to scrutinize that authority and express an opinion about its propriety. [...] Openness in the criminal process is consistent with these tenets of liberal thought, in that

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[58] McLachlin, *supra* note 9.

[59] Cameron, "Rationales", *supra* note 52. See also Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy" (2006) 58 Admin. L. Rev. 131 at 142: Discussing the important role the courts should play in preventing unnecessary secrecy from the US Government, Fuchs wrote: "The Court has adopted the same rationales for openness as those discussed by the founders of the nation. Chief among these is the power of the public to act as a check: "Without publicity, all other checks are insufficient: in comparison [to] publicity, all other checks are of small account." Further, the Court has recognized that openness fosters fairness and legitimacy on the part of the government."

[60] *Vancouver Sun*, *supra* note 32 at para. 25.

[61] *Ibid.*

> the freedom to express oneself about any government behaviour advances democratic aims. Openness also contributes, however, to the fulfillment of the objective of the administration of justice. Scrutiny of the behaviour of those involved in the trial process contributes to the likelihood of justice being done. [...] It is often assumed that the defences of the principle of open justice offered by scholars such as Bentham are "no more than an instinctive reaction against Star Chamber proceedings".[62]

Public scrutiny and public access link with the orality aspect of the open court principle. According to a recent study, "Orality is key to reducing corruption in the legal system in developing countries. [...] Orality opens judicial proceedings that were once secret thereby fostering transparency in proceedings and decisions."[63]

Discussing the benefits of transparency, Daniel J. Solove wrote:

> [...] Transparency provides the public with knowledge about the government and an understanding of how it functions. [...] "Sunlight is said to be the best of disinfectants," said Justice Brandeis, "electric light the most effective policeman." Public arrest records provide "valuable protection against secret arrests and improper police tactics," and preserve "the integrity of the law enforcement and the judicial processes" by ensuring that the public can prevent abuse of the government's power to arrest individuals. Open access to public court records "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." [...] According to Justice Oliver Wendell Holmes:
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> > It is desirable that the trial of [civil] causes should take place under the public eye not because the controversies of one citizen with

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[62] Law Reform Commission of Canada, *supra* note 48 at 14-15.

[63] Management Sciences for Development, Inc., *Reducing Judicial Corruption*, 2006, online: <http://128.242.66.13/documents/MSDCORPORATECAPABILITYSTATEMENTReducingJudicialCorruption.doc>.

> another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.
>
> Access to court records permits the public to examine the record before a court that makes a decision having effects for the public at large. Issues raised in a product liability case could have significance for millions of others who use a product. Information about how certain types of cases are resolved – such as domestic abuse cases, medical malpractice cases, and others – is important for assessing the competency of the judicial system for resolving important social matters. Scholars and the media need to look beyond a judicial decision or a jury verdict to scrutinize records and evidence in a case. [64]

This last argument demonstrates the importance of the role of the citizenry in assuming judicial accountability. Access – transparency – allows the citizenry and media to monitor the functioning of the court.[65] If this power to scrutinize the business of the courts is taken away from the citizen, who will perform this supervisory role beyond the Court of Appeal and the Supreme Court? This openness does not cast doubt over the finality of decision. It strengthens the public understanding and confidence in the justice system.

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[64] Daniel J. Solove, "Access and Aggregation: Public Records, Privacy, and the Constitution" (2002) Minnesota Law Review, Vol. 86, No. 6 at 1174, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283924#PaperDownload>.
Solove goes even further by writing: "The ability to identify jurors enables the media to question them about the reasons for their verdict." On the last point, it must be noted that in Canada, it is illegal to question jurors.
See also Gregory M. Silverman, "Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet" (2004) Washington Law Review, Vol. 79: 175 at 209: "The principal benefits promoted by public access to court records may be grouped into two categories: accountability and citizen education."

[65] One interesting feature of this argument is that it is not necessary that any particular individual monitor any particular case – it is the possibility of surveillance – the hypothetical surveillance – that seems to act as a justification.

c) Check on perjury

Jamie Cameron underlined that the open court principle provides a check on perjury.[66] Parties, witnesses and any other individuals involved in the judicial system are inevitably more careful to tell the truth when they testify with the knowledge that their every word can be scrutinized and challenged by the public. I do not mean people will run into court to claim falsehoods, but there is a real possibility someone will come forward and provides relevant evidence to the contrary.

d) Promoting search for truth

If people learn of the case, they may come forward with additional evidence; the public plays an active role in the search for truth. By making the evidence, witnesses' testimony, affidavits and sworn statements available there is a possibility the public may discover irregularities which might not be known by the other parties or the court.

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[66] Cameron, "Rationales", *supra* note 52. See also Meredith Fuchs, "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy" (2006) 58 Admin. L. Rev. 131 at 142: Discussing the important role the courts should play in preventing unnecessary secrecy from the US Government, Fuchs wrote: "The Court has adopted the same rationales for openness as those discussed by the founders of the nation. Chief among these is the power of the public to act as a check: "Without publicity, all other checks are insufficient: in comparison [to] publicity, all other checks are of small account." Further, the Court has recognized that openness fosters fairness and legitimacy on the part of the government."

e) Overall: encourage public respect for administration of justice

For the Chief Justice of Canada, there is a single unifying purpose which animates all the benefits derived from the preservation of the open court principle --- the preservation of public confidence in the administration of justice:

> By promoting and preserving public confidence in the judicial system, the open court principle serves to maintain the authority of the courts and the rule of law in a civil society.[67]

I agree with the Chief Justice in that an intelligent and informed public will be more respectful of the justice system if it is open. Openness will also allow for constructive criticism and proposals for reform of the justice system.

In 2003, McLachlin C.J. said: "In the final analysis, the open court principle is not an end in itself, but a means to promote the rule of law and the administration of justice. It follows that openness may yield where the paramount object that it serves -- preserving the integrity of the administration of justice -- so requires. This paramount object underlies both the exceptions to the principle of openness and its limits."[68] Again, I agree the open court principle will yield when, based on a proper test, it is found that justice requires otherwise.

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[67] McLachlin, *supra* note 9.

[68] *Ibid.*

In the *Vancouver Sun* decision, the Supreme Court of Canada mentioned openness "is integral to public confidence in the justice system and the public's understanding of the administration of justice"[69] and that it "is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts"[70]

When the public is denied access to court proceedings, they react with suspicion and speculation. The murmurs of discontent which result from privacy soon turn into rumblings of disrespect, undermining the public's respect for the administration of justice. For example, Nazhat Shameem J. of the High Court of Fiji mentioned in her speech about the country's year 2000 events – unanimous adoption of a new Constitution, civilian coup d'état followed by a military one and judicial independence – that:

> It was an unsavoury situation fuelled by judicial dishonesty, lack of judicial accountability and an extraordinary refusal to accept responsibility for a number of quite irregular decisions of questionable integrity. In those circumstances, judicial secrecy was used to hide judicial misconduct. It led to great distrust and disrespect for the judiciary, held by members of the Bar, and by the public.[71]

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[69] *Vancouver Sun*, *supra* note 32 at para. 25.

[70] *Ibid.*

[71] Nazhat Shameem, "Maintaining Judicial Independence in Fiji" (speech presented before the International Association of Women Judges, May 2006) at 4, online: <www.iawj.org>.

2. Constitutional Justifications

The Law Reform Commission stated: "…openness in the administration of justice has long been regarded as a cornerstone of a society founded on democratic principles."[72] Furthermore, it explained the justifications of the open court principle were obviously compatible with the liberal theories of freedom of expression and freedom of the press and that "according to a liberal view of the criminal justice system, the prosecution of an offence is essentially the exercise of government authority."[73]

The Chief Justice of Canada recognized the open court principle is a "principle of constitutional significance" and that it is a "fundamental element of the law of many countries including Canada, the United Kingdom, the United States, Australia and New Zealand."[74]

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[72] Law Reform Commission of Canada, *supra* note 48 at 15.

[73] *Ibid.* at 14-15.

[74] McLachlin, *supra* note 9. See also Susan Kenny, "Concepts of Judicial Responsibility: The Contribution of the "One of Seven"" (paper presented at the CCCS Conference, University of Melbourne, March 5, 2004): "Australian judges all know, I think, that, as the Judicial Committee of the Privy Council then said, "publicity is the authentic hall-mark of judicial … procedure". As Chief Justice Spigelman said in an address to the Australian Legal Convention: *The principle that justice be seen to be done … is one of the most pervasive axioms of the administration of justice in our legal system.*"

I note that during the discussions surrounding the adoption of the *Charter of Rights and Freedoms*[75] in 1981, the Canadian Bar Association recommended the entrenchment in the Constitution of the right to freedom of information with regard to government information.[76] Despite the absence of this sort of express provision in the *Charter*, I am of the opinion that justification for the open courts principle can be found in the *Charter* itself. The *Charter*, and the rights and freedoms protected in it, are meaningful only if citizens are informed of what the courts are doing. The judicial system plays a very important role in the interpretation and protection of these rights, a role that cannot and should not be played behind closed doors. There are explicit and implicit foundations for openness found in the *Charter* and the open court principle is derived, required and supported by the *Charter*.

Under the explicit foundations, I list s. 11(d) of the *Charter*, and s. 23 of the *Quebec Charter*. Under the implicit foundations, I list the requirement for a jury s. 11(f) of the *Charter*, and s. 2(b) of the *Charter*, freedom of expression and press. Under implicit we could also list the Preamble of the *Charter* and its reference to the rule of law.

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[75] *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Part 1 of Schedule B to *the Canada Act, 1982* (U.K.) 1982, c. 11; came into force on April 17, 1982 (the "Charter").

[76] *House of Commons Debates*, (29 January 1981) at 6695 (S. Robinson).

a) Explicit foundations

i) S. 11(d) of the *Charter*

> 11. Any person charged with an offence has the right [...]
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

There is an explicit right for a *public* hearing by an independent and impartial tribunal for proceedings in criminal and penal matters. Entrenched in the *Charter* is the concept that publicity is a protection for the accused.

ii) S. 23 of the *Quebec Charter*

I also see a justification for the principle in the Quebec's *Charter of Human Rights and Freedoms*.[77] First, in the Preamble it is mentioned: "Whereas the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being". At section 23, it is written:

> Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
> The tribunal may decide to sit in camera, however, in the interests of morality or public order.

[77] *Charter of Human Rights and Freedoms*, 1975, Chapter 6, Chapter C-12.

I note discretion is given to the tribunal to close the hearings, and the 'right to respect for his private life' which is recognized at s. 5 of the Quebec's *Charter* is not mentioned at s. 23 as a ground to justify in camera hearings. From this I understand that for the sake and safety of every citizen justice must be done in the open.

b) Implicit foundations

I have already touched on some of the constitutional aspects under *The Principle's History* section: (1) Spigelman mentioned the separation of powers, and (2) the U.S. Supreme Court stated that openness is not an accused's constitutional right, but a constitutional requirement. I will now take a closer look to the foundations found in Canadian law.

i) Preamble of the *Charter*

The preamble of the *Charter* states:

> Whereas Canada is founded upon principles that recognize [...] the rule of law [...]

Canada is founded upon principles that recognize the rule of law, and if we go back to the arguments for "orality", it may be seen that historically publicity of

trials and courts proceedings is a fundamental or an implicit part of the rule of law. The open court principle recognizes the rule of law because the law cannot be obscure. The law must be known and accessible. The law is not static; it lives through the resolution of conflicts brought before the courts.

In the justice system, we expect decisions based on the rules, not merely personal opinions. Publicity is one accountability mechanism which allows public surveillance of the courts.

ii) S. 2(b) of the *Charter*

In *Edmonton Journal*[78], the issue before the Supreme Court of Canada was whether the limitation imposed by the Alberta government on the media to publish information relating to a family proceedings, except for some information such as names, addresses, occupations of the parties and witnesses, constituted a justifiable infringement of freedom of expression.[79] Cory J., wrote the following for the majority respecting the importance of s. 2(b) of the *Charter* and the reporting of court proceedings:

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[78] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

[79] S. 30 of the *Alberta Judicature Act*, R.S.A. 1980, c. J-1 read as follows:
No person shall within Alberta print or publish or cause or procure to be printed or published in relation to a judicial proceeding in a court of civil jurisdiction in Alberta for dissolution of marriage or nullity or marriage [...] any matter or detail the publication of which is prohibited by this section, or any other particulars except (a) the names, addresses and occupations of the parties and witnesses, (b) a concise statement of the charges, defenses and counter-charges in support of which evidence has been given". See also *Edmonton Journal, supra* note 78 at 1334-1335.

> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.[80]

The court recognized the importance of the concept that justice be done openly has been known to Canadian law for centuries.[81] From its analysis, the court concluded: "[...] that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny."[82] There are many instances where this analysis is strongly supported.

Again, in *Edmonton Journal*, on the open court principle in the context of freedom of the press, Wilson J. added:

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[80] *Edmonton Journal, supra* note 78 at 1337.

[81] *Ibid.* at 1338-1339.

[82] *Ibid.* at 1339.

> There can be little doubt that restricting the freedom of the press to report cases before the courts goes against the traditional emphasis which has been placed in our justice system upon an open court process.[83]
> [...]
> Thus, not only is an open trial more likely to be a fair trial but it is also seen to be a fair trial and thereby contributes in a meaningful way to public confidence in the operation of the courts. [...] It is also worth nothing that there is an important educational aspect to an open court process.[84]
> [...]
> In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (3) to promote a shared sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts effects them.[85]

In 2005, in *Toronto Star Newspapers Ltd. v. Ontario*[86], the Supreme Court of Canada dismissed the appeal of a decision quashing an order sealing search warrants. Fish J. for the Supreme Court of Canada wrote:

> In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.
> That lesson of history is enshrined in the Canadian Charter of Rights and Freedoms. Section 2(b) of the Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes in the courts ought therefore to be, and manifestly is, of central concern to Canadians.[87]

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[83] *Ibid.* at 1357-1358.

[84] *Ibid.* at 1360.

[85] *Ibid.* at 1361.

[86] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41.

[87] *Ibid.* at paras. 1-5:

And in *Vancouver Sun*, the Supreme Court of Canada mentioned that "[t]he open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein"[88]

In *Edmonton Journal*, the Supreme Court found that the limit imposed by s. 30 of the *Alberta Judicature Act* was not reasonable and demonstrably justified. In its consideration of s. 1 of the *Charter*, based on the evidence, the court made the following finding:

> The importance of freedom of expression and of public access to the courts through the press reports of the evidence, arguments and the conduct of judges and judicial officers is of such paramount importance that any interference with it must be of a minimal nature.[89]

"The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted. Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*. This criterion has come to be known as the Dagenais/Mentuck test, after the decisions of this Court in which the governing principles were established and refined."

[88] *Vancouver Sun*, *supra* note 32 at para. 26.

[89] *Edmonton Journal*, *supra* note 78 at 1343-1348. The Court also held that:

- "The problems before the court in matrimonial causes could not conceivably be said to so affect public morals that the public should be shielded from the proceedings."
- "[...] no evidence was introduced to support the contention that in the absence of s. 30(1), potential litigants would be dissuaded from going to court."
- "Nor can it be said that there is the requisite proportionality between the overly restrictive provisions of s. 30(1) and the important right to report freely upon trial proceedings. In today's society it is the press reports of trials that make the courts truly open to the public. The principle that courts must function openly is fundamental to our system of justice. The public's need to know is undeniable."

On the right to privacy, Wilson J. noted Lord Blanesburgh's remarks, which in her view "provide a stern reminder of the importance of not allowing one's compassion for that limited group of people who are of particular interest to the public (because of who they are or what they are alleged to have done) to undermine a principle which is fundamentally sound in its general application."[90]

Wilson J. noted that both values, the right of the public to an open court process, which includes the right of the press to publish what goes on in the courtroom, and the right of litigants to the protection of their privacy in matrimonial disputes, cannot be fully respected given the context in which they come into conflict in this case. [91] At the end, the Court had to determine if the limit imposed by the *Alberta Judicature Act* constituted a reasonable limit on the freedom of the press, and concluded it was not.

That said, in our society, parties may also opt for other means of resolving their disputes, for example arbitration or alternate dispute resolutions (ADR). These processes are often if not always confidential, however, decisions issued under these processes do not make jurisprudence, are not binding on third parties not

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- "The legislation would ban the publication of court documents that might have a wide public interest and would prevent the public from knowing about a great many issues in which discussion should be fostered."

[90] *Ibid.* at 1366.

[91] *Ibid.* at 1367.

part of the process, and are not enforceable unless an order is sought in a public court. Doré's recent article shows there is an ongoing discussion around the secrecy of ADR: *Public Courts versus Private Justice: It's time to let some sun shine in on alternative dispute resolution.*[92]

iii) S. 11(f) of the *Charter*

> 11. Any person charged with an offence has the right [...]
> (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

There is an explicit right to be tried by jury (by our peers, by the public) if the punishment for an offence is imprisonment is for five years or more. The open court principle is implicitly found in the requirement to have individuals hear and decide the case. We should not have the right to arrest and imprison people without releasing their names or their crimes, such as was done in the U.S. after 9/11 with enemy combatants (for example, the *Arar* affair and the *Hamdam* case).[93] Consider: public knowledge of detention or arrest actually affords

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[92] Laurie Kratky Doré, "Public Courts versus Private Justice: It's time to let some sun shine in on alternate dispute resolution", Chicago-Kent Law Review, Volume 81, Number 2, 2006, at 463, online: <http://lawreview.kentlaw.edu/Contents_81-2.html>.

[93] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report – Analysis and Recommendations, 2006, online: <www.commissionarar.ca> at 304: "In this chapter, I have described a number of steps taken in the Inquiry to address difficulties arising from a process in which some information could not be made public, the most important being the use of independent counsel during the *in camera* hearings. However, I do not suggest that steps such as these are an adequate substitute for public hearings, in which the public can scrutinize the

protection to the individual. If the actions are highly questionable or unjustified, the public will ask questions.

Having demonstrated the importance of the open court principle, I must note that despite its importance the open court principle is not absolute. The principle does not exist in a vacuum and may "yield in degree of its application to a balancing of legitimate and significant interests."[94] In 2006, Rothstein J. for the Supreme Court wrote: "I am mindful that openness of the court's process is a recognized principle. However, as with all general principles, there are exceptions."[95] Some exceptions may be based on privacy interests. In the next Chapter, I will consider the notion of privacy.

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evidence first-hand and affected parties are able to participate. If it is possible to hold a public hearing, this should always be the first option. Openness and transparency are hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decision. As Fish J. aptly put it in the *Toronto Star* case, "In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy." See also *Hamdan v. Rumsfeld*, 548 U.S. ___ (2006), No. 05-184, June 29, 2006 (syllabus at 7): "Even assuming that Hamden [*sic*] is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."

[94] *R. v. Adam*, 2006 BCSC 601 at para. 26.

[95] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at para. 25.

Chapter III. Privacy: Nature and Justifications

Issues of access to court records are tugged between two large sets of principles and interests – relating, on one hand to open courts, and on the other hand, to privacy. This Chapter will explore the nature and justifications of privacy, but I do not intend to provide an exhaustive discussion of what could easily in itself be the topic of a dissertation. Since privacy claims are the main barriers asserted against freer access to court records, some account of privacy is necessary. I will consider (A) what is meant by "privacy"; (B) what is meant by a "right" to privacy; (C) justifications for a right to privacy; and (D) the scope of privacy claims.

A. What is Meant by "Privacy"?

It is essential that we clarify there are two main types of privacy[96]:

(1) the ability to prevent surveillance or intrusions by others (i.e. ability to control access by third parties) and

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[96] Amitai Etzioni, *The Limits of Privacy* (New York: Basic Books, 1999) at 211: "Indeed, only relatively few acts are both under individuals' control and legitimately conducted in ways that defend them from scrutiny – voting for public offices, for instance. Few others, such as standing trial for criminal activity, are both expressions of government control and acts carried out in full public view, even on television." See also: Russell Brown. "Rethinking Privacy: Exclusivity, Private Relation and Tort Law" (2006) Alberta Law Review 42:3 at 589; Richard Bruyer. "Privacy: A review and Critique of the Literature" (2006) Alberta Law Review 42:3 at 553.

(2) the ability to make decisions by oneself; the State or others do not make the decisions or limit decisions that may be legally made. This is the type of privacy at issue in (e.g.) *Roe v. Wade*[97], regarding the decision to have an abortion.

Only the first type of privacy (relating to the control of access) is directly at work in the present context, so I will confine my analysis to this type of privacy. Privacy in this sense has three main subtypes:

(1) spatial (e.g. property, trespass);

(2) physical (e.g. body, taking bodily samples); and

(3) informational (e.g. control over personal information).[98]

Under the third sub-type, informational privacy, what is kept private is information relating to an identifiable individual (or group of individuals) as opposed to other individuals, groups, the State or private organizations. In this sense, privacy means that there is a "realm in which an actor (either a person or a group, such as a couple) can legitimately act without disclosure and accountability to others. Privacy thus is a societal license that exempts a category of acts (including thoughts and emotions) from communal, public, and governmental

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[97] *Roe v. Wade*, 410 U.S. 113 (1973). Section 7 of the *Charter* can also be a foundation for this protection.

[98] *R. v. Dyment*, [1988] 2 S.C.R. 417 at paras 17-22; *R. v. Tessling*, [2004] 3 S.C.R. 432 at paras. 20, 23-24.

scrutiny."[99] As explained by Etzioni, this privacy is characterized by trust: "Society deems that a person will not be under surveillance, but it does not forgo its right to act - for example, in cases where a person uses his or her privacy to molest a child or make bombs."[100]

B. What is Meant by the Right to Privacy?

A privacy "right" is a socially accepted claim about the scope of privacy, which is generally a legal claim.[101] For example, there is a host of articulations of the right to privacy. Returning to the three sub-types of privacy:

a) there are criminal and torts rules dealing with spatial (property) privacy - for example rules dealing with search warrants to enter premises;

b) there are criminal and torts rules dealing with physical (bodies) privacy - for example rules dealing warrants to collect bodily samples;

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[99] Etzioni, *supra* note 96 at 196.

[100] *Ibid.* at 209-210.

[101] Peter Burns, "The Law and Privacy: The Canadian Experience" [1976] 54 Canadian Bar Review 1 at 11. Burn proposed:

> "It may be useful as a legal concept to regard the "right to privacy" as a principle, having a high order of generality, than a rule which will govern specific cases. In such a way the right to privacy will reveal directions and be elastic. The rules will be articulated by statutes, case law and constitution, whereas the principle will be derived from moral and psychological imperatives. Accordingly the "right to be let alone" is not a rule but a principle which merely gives guidance in a specific case."

c) there are multiple rules dealing with informational (information) privacy - for example, evidence (e.g. privilege) rules; professional ethical rules (e.g. confidentiality); statutory rules (e.g. FOIPP Act); emerging torts rules; contracts; rules re wiretaps, etc.

In recent decades, privacy rights have also been specifically recognized in s. 5 of the *Quebec Charter*[102], in s. 8 of the *Charter*[103] and in statutes. In 1978, privacy legislation in the federal public sector made its debut as Part IV of the Canadian *Human Rights Act* which was later replaced by the *Privacy Act* in 1982. In 2000, further legislation, the *Personal Information Protection and Electronic Documents Act*, was adopted hoping to add additional protection for personal information in the private sector. Provinces and territories have also adopted freedom-of-information and privacy legislation.

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[102] *Charter of Human Rights and Freedoms*, *supra* note 73, s. 5: "Every person has a right to respect for his private life."

[103] *Dagg v. Minister of Finance*, [1997] 2 S.C.R. 403 at para. 66. Justifications for privacy are also found in the *Charter* and the jurisprudence. In *Dagg v. Minister of Finance*, La Forest J. wrote:

> "Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights and Freedoms*, see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. Certain privacy interests also inhere in the s. 7 right to life, liberty and security of the person; see *R. v. Hebert*, [1990] 2 S.C.R. 151, and *R. Broyles*, [1991] 3 S.C.R. 995."

C. Justifications for the Right to Privacy

It is clear that we should have some right to privacy; it is hard for us to imagine ourselves without any sort of privacy, but the scope of the right or of its articulations is contestable. "The amount of privacy each one of us wants or needs varies from one person to another, but every one of us requires at least a modicum of privacy if we are to protect our very humanity."[104] Privacy protects intimacy, identity, dignity, integrity and even, one might argue, sanity.[105] Imagine a society where anyone could, without authorization, enter our house, collect our hair or blood, demand our fingerprints, or collect our personal information. What would be the cumulative effect on our way of life, on our individual growth and development, on our relationships? Orwell's grim portrait of life without privacy in *1984* is surely accurate.

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[104] *House of Commons Debates*, (29 January 1981) at 6704-6705 (Hon. Perrin Beatty).

[105] *Canadian (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 at para. 52. In its analysis of the concept of privacy, the court wrote:

> "The Task Force cited in *Dyment* [...] refers to "information about a person...in a fundamental way his own for him to communicate or retain for himself as he sees fit". The same concepts of intimacy and identity are found in the passage from *Duarte*, quoted in *Dagg* [...]: "...the right of the individual to determine for himself when, how and to what extent he will release personal information about himself". Alan F. Westin refers to "the claim...of individuals...to determine for themselves when, how and to what extent information about them is communicated to others". Charles Fried says "[p]rivacy...is control over knowledge about oneself'."

D. How Much Privacy?

1. The Scope of Privacy: General Reflections

While it is true we require some degree of privacy, the question remains; how much do we really need? How do we determine the proper scope of our claims to privacy? The scope of privacy claims, what gets protected, is historically and socially variable;[106] privacy varies with time and location, economics, government and geography. In some places or situations, there will be a greater expectation of privacy.[107]

100 years ago a family with ten children did not have the same privacy expectations as those of a two-child family in this century. Families living in a rural village of three hundred souls have very different expectations of privacy from those living in a cosmopolitan city of one million. World geography also

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[106] "Privacy": Stanford Encyclopedia of Philosophy, online: <http://plato.stanford.edu/entries/privacy/>.

[107] Gus Hosein, Privacy as Freedom, in *Human Rights in the Global Information Society*, edited by Rikke Frank Jorgensen, The MIT Press, 2006, at 142. Hosein wrote:

> "When the U.S. Supreme Court ruled that individuals have a constitutional right to privacy, it issued the following condition: the individual who claims that his constitutional right to privacy was invaded must have had a reasonable expectation of privacy. Similarly, within the European Convention on Human Rights, the right to privacy is balanced against many other considerations, on the following condition developed by the European Court of Human Rights: incursions on privacy must be in accordance with law and necessary in a democratic society. Thus our autonomy, dignity, and freedom are at the mercy of social trends. The "reasonable expectation" is actually a two-pronged test. First, the person must act as though he expected privacy. [...] Second, society must be prepared to recognize that expectation as reasonable."

defines privacy; some aspects of life such as childbirth, death and illness may be perceived variously as either very intimate or a matter of public participation. Citing Alan Westin, Etzioni observed that "[e]ach individual must, within the larger context of his culture, his status, and his personal situation, make a continuous adjustment between his needs for solitude and companionship; for intimacy and general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure."[108]

Even within a particular society at a particular moment of history, privacy varies with social context and circumstances. Consider a statement made by one individual to another. If the individuals are in an intimate relationship, it would be an affront, a breach of privacy, if the other repeated the statement to a third party. If a statement was made by an instructor to a student in the course of teaching duties, the instructor would hardly be surprised if the student repeated what was said to another student; it would however, be an affront, a breach of privacy, if the student repeated the statement to a reporter. If a statement was made by a politician in the course of a public meeting, the politician could not complain if his statement were widely publicized, and so on. The circumstances in which we convey information and the purpose for our communication has a direct bearing on the degree of privacy protection we would expect when relaying the communication.

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[108] Etzioni, *supra* note 96 at 200.

Balancing the need for privacy, accountability, social responsibilities and commitment to the community must also be considered.[109] Personal information does not fall directly into absolute categories such as private and public; the information falls on a continuum. There are different degrees of privacy, hence, different degrees of disclosure. The expectation of privacy will vary depending on the level of accountability to which the citizen will be held in a particular environment. Allen said that accountability is important, insofar as only responsible individuals can be accountable.[110]

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[109] *Ibid.* at 195-196: "The realms of rights, private choice, self-interest, and entitlement were expanded and extended, but corollary social responsibilities and commitments to the common good were neglected, with negative consequences such as the deterioration of public safety and public health."

[110] Anita Allen, "Privacy Isn't Everything: Accountability as a Personal and Social Good", in Adam D. Moore, *Information Ethics: Privacy, Property, and Power*, (Seattle: University of Washington Press, 2005) at 399, 400, 408. She wrote:

> "Because privacy is under siege in the contemporary world, it is temping to downplay the positive value of accountability for private life. Yet, although privacy is important, it is not everything. Accountability matters too. "None of your business!" in response to accountability demands is not always warranted. Privacy and accountability each in their own way render us more fit for valued forms of social participation.
> [...]
> However, accountability for the uses of intimacy is a common imperative, expectation, and deeply felt obligation in our society. As individuals, couples, families, and communities, we live lives enmeshed in webs of accountability for conduct that include accountability for intimacies relating to sex, health, child-rearing, finances, and other matters termed "private." We are accountable for nominally private conduct both to persons with whom we have personal ties and to persons with whom we do not have personal ties. We are accountable to the government, and we are accountable to non-government actors. We are accountable for plainly harmful and other-regarding conduct in our nominally private lives
> [...]
> Accountability chills, deters, punishes, prompts, pressures, and exposes. These are evils when they amount to unjust domination or frank violation. They are not, however, always evils. Indeed, there are positive dimensions to accountability's qualifications of privacy and private choice. Accountability protects, dignifies, and advantages."

The right of privacy is never absolute and will always be balanced against societal needs.[111] We may distinguish between the scope of privacy protections as against compulsory access or mandatory disclosure, and the scope of privacy protections following voluntary disclosure by examining the well established rules dealing with compulsory access by the State. For example, compulsory disclosure may require a search warrant which must satisfy stringent procedures and tests,[112] whereas compulsory access by the State to personal information for statistical, customs or revenue purposes is conducted under statutory guarantees of confidentiality.[113]

In some contexts, voluntary disclosure of information is also protected, such as disclosure of personal information to private or public organizations to obtain particular services or goods.[114] However, the extent of such protections are still being debated and questioned,[115] and in general, organizations rely on the fair

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[111] *R. v. Adam*, *supra* note 94 at para. 33.

[112] *Criminal Code*, R.S.C. 1985, c. C-46, s. 187(1) and 487.3(1).

[113] *Statistics Act*, R.S.C. 1985, c. S-19, s. 17; *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), s. 241; *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 107.

[114] Francis E. Rourke, *Secrecy and Publicity: Dilemmas of Democracy*, (Baltimore: The John Hopkins Press, 1961) at 102-103. Professor Rourke wrote:
"[...] because the expansion of bureaucratic power that has occurred in recent years has placed in the hands of government officials a great deal of information on what might fairly be viewed as the private affairs of individual citizens, and the promiscuous publicizing of this information could bring serious damage to either the economic status or the personal reputation of such individuals without serving any commensurate public purpose. Insofar as rules requiring secrecy guard against this eventuality, they strengthen rather than compromise the spirit and practice of constitutionalism."

information principles which mandate that the information shall be used and disclosed only for the purposes for which the information was originally provided. Most FOIPP legislations have adopted this approach. Once the information is disclosed to an organization and when this disclosure is made in a context where there is an expectation of privacy, there will be entitlement to privacy protection. When the information is disclosed to an organization and when this disclosure is made in a context where there is no expectation of privacy, there will be no entitlement to privacy protection. But, when the personal information is publicly disclosed before a public audience or forum, then there is no privacy protection.[116]

2. The Scope of Privacy: Court Records

In the judicial system, personal information is collected, used and disclosed, and in the judicial system context, there are no statutory "rights" of privacy, since FOIPP legislation doesn't apply. Because of the open court principle, there is a need for citizens to have access to that information, and it is therefore my argument that we should treat that personal information differently than personal information that circulates in public bodies or private organizations. Access

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[115] Marc-Aurèle Racicot. "Englander v. Telus: Protection of Privacy in the Private Sector Goes to the Federal Court of Appeal" (2006) Alberta Law Review 43:3 at 825. See also Pierre Trudel, *Rule of Law and the Effectiveness of Privacy Protection in E-Government Networks*, paper presented at the Canadian Institute for the Administration of Justice annual conference, "Technology, Privacy and Justice", Toronto, September 2005.

[116] *Canada (Information Commissioner) v. Chairman of Canadian Cultural Property Export Review Board*, (2001) 15 C.P.R. (4th) 74 (Fed.T.D.), affirmed 2002 FCA 150 (Fed.C.A.).

allows citizens to evaluate whether justice is working properly; we need to know whether its operations were skewed by the identity of the persons before the court (i.e. rich and powerful people; politically unpopular accused). Unlike situations outside the courts, and again, because of the open court principle – we do not start with privacy, we start with openness - those who want privacy have to go through a process and justify the need for privacy. One major difference between the legal context and the public/private bodies context, which supports treating personal information differently, is accountability. When individuals appear before public courts of justice, either as plaintiffs to obtain a decision which will be enforceable with the power of the State, or as witnesses to provide evidence that could lead the imprisonment of an individual, accountability and responsibility towards society is very high, as opposed to the expectation of privacy, which is very low.

Inevitably, participating in the justice process is not always a pleasurable experience; victims may have to provide intimate information[117] and plaintiffs or defendants may have to disclose personal information. This information is an integral part of the factual foundation of a case from which a decision will be issued. Even if the information before the courts was not provided voluntarily, information obtained and put into the record through compulsory process (e.g. information respecting civil defendants or criminal accuseds; or information

[117] Lise Gotell. "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) Alberta Law Review 43:3 at 743.

relating to third party witnesses), it is still part of the factual foundation on which a decision is issued. Unless a court decides otherwise, that information is part of the records, and accordingly is available to the public.

This all begs two questions. While the courts are not governed by FOIPP legislation, should they be governed by FOIPP principles? What is a reasonable solution taking into account the importance of the open court principle?

Chapter IV. Practical Obscurity versus Enhanced Access

Courts – administrations and parties – have created records containing personal information ever since they came into being. Historically, in practice, information contained in court records was not easy to access, collect or link because of "practical obscurity", which offered some sort of privacy protection. Now, that perceived fail-safe has been removed; with the assistance of technology we are able to access and link the information (the mosaic effect). It was said "[o]nce judicial records go online [...] computerized compilers can search, aggregate, and combine the information with information from many other public filings to create a profile of a specific individual in a matter of minutes, at minimal cost."[118] It was written that "this movement to post court information online represents a quiet revolution in citizen access and government accountability."[119] Is this revolution in information access a cause worth defending, or should we preserve practical obscurity? Can or should we ignore technology? First, I will define the concepts. Second, I will discuss the problem and finally, will propose a solution.

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[118] Peter A. Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004) *Washington Law Review* Vol. 79:307 at 316. See also Lynn Eicher Sudbeck, "Placing Court Records Online: Balancing Judicial Accountability with the Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records", Institute for Court Management, May 2005 at 12.

[119] Katy Roche, "A Quiet Revolution in the Courts: Electronic Access to State Court Records", Centre for Democracy & Technology, Washington D.C., August 2002, online: <www.cdt.org/publications/020821courtrecords.shtml>.

A. What is Practical Obscurity?

Practical obscurity simply means that paper records located and the information contained in them (e.g. party names, action number) in a specific court's registry are difficult to access, consult and search. The hours of operation and location of the courthouse can be limitations, as can the time and cost of travel, which may prevent an individual from having access to the information. Additionally, the format of the records (i.e. paper-based records) presents another limitation in terms of research time, time and cost of making copies, etc. Hence, the information contained in court records is practically obscure.

Basically, practical obscurity establishes a balance; on one hand the information is provided and is accessible but on the other hand the information is hard to get and accessibility is limited. It can therefore be said that public use of the information is balanced against limited public access to the information.

For Ira Bloom, the consequences of practical obscurity were quite significant:

> When records data are accessible only by physical means (that is, by visiting government offices), the costs of travel and the time required to go through paper documents one by one will limit information gathering. Also,

> it is difficult to remain anonymous while gathering information systematically under the eye of government staff.[120]

Winn agreed, stating "Only those with a relatively strong interest in the information would take time out of their day, wait in line at the clerk's office, fill out the necessary forms, and pay the necessary copy charges."[121] It is obvious that currently, privacy is protected by the practical obscurity created by the physical inconvenience of attending at each courthouse to examine the dockets.[122] My argument in section C will be that a balance has not been achieved and the access and privacy scales are unfairly tipped towards privacy.

Practical obscurity is now undermined by technological developments because access to court records in electronic format, as opposed to paper format, will allow for (1) remote access through the Internet, (2) enhanced search capabilities (e.g. by name, identification numbers, date of birth, keywords...), and (3) bulk searches. As we will see below, it is argued that such enhanced access is not desirable and practical obscurity should be kept.

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[120] Ira Bloom, "Freedom of Information Laws in the Digital Age: The Death Knell of Informational Privacy" (2006) 12 Rich.J.L. & Tech. 9 at 9, online: <http://law.richmond.edu/jolt/v12i3/article9.pdf>.

[121] Winn, *supra* note 118 at 316. See also Sudbeck, *supra* note 118 at 12.

[122] *Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services)*, [1997] 1 F.C. 164.

B. Practical Obscurity's Privacy Protection: Justifications

For Professor Judge "practical obscurity may have been a principled policy and not just a logistical fact":

> The physical limitations that were intrinsic to the traditional model, including time, energy, cost, and geography, were not just inconvenient obstacles toward full unfettered access. Instead they were integral privacy safeguards that helped the system function as it was intended.[123]

For Judge, this conclusion "does not mean we have to continue to distinguish court records based on paper from electronic sources or remote from onsite access."[124]

For the courts in *Krushell* and *Reporters*, practical obscurity offers protection of privacy. In *Alberta (Attorney General) v. Krushell*, the Court of Queen's Bench of Alberta decided "[W]hile there is currently limited access to this information via the physical daily posting of the criminal dockets on site, that does not justify posting world-wide for all time to all of those with access to the internet. Currently privacy is protected by the practical obscurity created by the physical inconvenience of attending at each courthouse to examine the criminal dockets by others than those who have involvement in the matters then before the courts

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[123] Judge, *supra* note 8 at 19.

[124] *Ibid.*

[...]"[125]. Commenting on the Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, Davis wrote:

> According to the Court, a citizen possesses a protected privacy interest in the criminal history information because "plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information. [p.764]" Thus, individuals maintain a privacy interest in the "practical obscurity" of records.[126]

Increased access through the internet is seen as a negative development, and brings to mind a paranoid vision of the rise of the machines:

> [...] the combination of electronic databases now held by state and local governments in digital form, the personal computer, computer networks, the internet, [...] may present the greatest threat to information privacy and to privacy more generally, a threat significantly greater than that created by corporate or governmental use and misuse of personally identifiable information.[127]

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[125] *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 para. 50.

[126] Charles N. Davis, "Electronic Access to Information and the Privacy Paradox: Rethinking "Practical Obscurity" (A Paper Presented to TPRC: The 29th Annual Conference on Information, Communication and Internet Policy, Oct. 27-29, 2001) at 6.
See also Charles N. Davis, "Electronic Access to Information and the Privacy Paradox: Rethinking Practical Obscurity and Its Impact on Electronic Freedom of Information", *Social Sciences Computer Review*, Vol. 21, No. 1, Spring 2003, 15 at 16-17. The protection offered by practical obscurity is often linked with the "central purpose" test. In the U.S., along with the notion of practical obscurity, there is also the 'central purpose doctrine'. This doctrine was developed around cases dealing with the U.S. *Freedom of Information Act*. As mentioned by Davis, it was determined that the FOIA's "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed." However Davis noted that "information about individuals can, and often, shed light on governmental operations and activities."

[127] Bloom, *supra* note 120 at 5. See also Silverman, *supra* note 64 at 175.

Practical obscurity is generally justified negatively, by alleged potential misuses that would result if it were reduced or eliminated. Practical obscurity theoretically protects against (a) data mining, (b) criminal uses of information, (c) "loss of forgiveness", and (d) damage to the repute of the administration of justice.

a) Data mining

In the United States, Laura W. Morgan, a family law practitioner, observed that

> Not surprisingly, as the demand for electronic access has increased, so has the demand for privacy because of the practice of data mining. Before the internet, court records were available only on paper at the courthouse where they were filed.[128]

The Canadian Bar Association also observed that electronic access to court records creates potential for misuse and abuse: "Extensive 'bulk' searchers by category, or 'data mining' is possible electronically, but not currently possible in

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[128] Laura W. Morgan, "Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records On Line" (2001) *Journal of the American Academy of Matrimonial Lawyers*, Vol. 17, p. 45 at 61. See also Law Commission of New Zealand, *supra* note 37 at 44. In New Zealand, Peter Boshier, Principal Court Judge, as argued for greater openness in the Family Court:
"There is every reason why the Family Court should be more open than it is at present. Any judicial process that is undertaken in a way in which it cannot be easily scrutinized is bound to attract criticism. The real relevance of this to the Family Court is that public confidence must be maintained and enhanced....where there are allegations of bias and delay, they are best met not by riposte, but by access to the decision making process."

the paper medium."[129] Data mining, the process of analyzing data to identify patterns or relationships, can be used for many purposes and the data may be manipulated to suit those purposes, whether or not they reflect the public good or the needs of those with a more questionable agenda. Data mining can provide the researcher with information about specific trends which in turn can show the need for some specific remedy. It can also provide a citizen with essential information about a person that has caused him/her damage. It can also be a means to another end, perhaps to identify a specific group of people and sell them a specific product or contact them to offer a service. Data mining can also be used by criminals to gather data about an individual or a private organization to commit a criminal offence.

b) Increase in crimes

With digital information, according to Bloom, "the implications for privacy of residents are enormous, as is the potential use of data for criminal activities such as kidnapping, murder, identity theft, and stalking."[130] For example, a criminal could use the court registry as a source of information to find out the address, income, or affiliation of a potential victim. The Canadian Bar Association submitted that "to assert that electronic judicial records should be placed under

[129] Canadian Bar Association, *supra* note 19 at 7.

[130] Ira Bloom, *supra* note 120 at 10. See also Winn, *supra* note 118 at 315.

the same rules as paper records is nothing more than to advocate for the free flow of information at the expense of the many other competing values."[131]

c) "Forgiveness"

In the United States, Winn wrote:

> The "practical obscurity" of old records generates an expectation of privacy that has been recognized as legitimate by common law courts. The concept of practical obscurity developed by federal courts in the context of FOIA cases also recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.[132]

According to Sudbeck, with technology, traditional protections based on practical obscurity are gone.[133] In Canada, Professor Elizabeth Judge warned "one danger to the loss of practical obscurity is the loss of "social forgiveness"."[134] Judge

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[131] Winn, *ibid.* at 315.

[132] *Ibid.* at 316-317.

[133] Sudbeck, *supra* note 118 at 12.

[134] Judge, *supra* note 8 at 15. See Chris Jay Hoofnagle, Electronic Files and Social Forgiveness, *Media, Privacy and Defamation Law Committee Newsletter*, Winter 2003, at 7. See also Beth Givens, Public Records in a Computerized Network Environment: Privacy Implications (speech presented at the First Amendment Coalition Conference Panel: "Ain't Nobody's Business But My Own: Privacy Versus the Right to Know", September 23, 1995), online: <www.privacyrights.org/ar/speech1.htm>. Givens provided the following example to explain "social forgiveness": "Your conviction on graffiti vandalism at age 19 will still be there at age 29 when you are a solid citizen trying to get a job and raise a family."

added "technology does change the *de facto* balance between access and privacy that was tenuously preserved through paper documents at the courthouse."[135]

d) Repute of the administration of justice

In her analysis, Sudbeck cited Dr. Gottlieb who wrote:

> Most people do not realize the information contained in the majority of court records is open to the public. They may suspect the grocery store is selling their buying information for marketing purposes, but they would never think their local court is giving away or selling their court information for a similar purpose.[136]

In that same report, it is written:

> It is a violation of the public's trust and confidence in the judicial system when courts knowingly allow that private information to be accessed for purposes other than that for which the information was originally provided and for reasons other than shedding light on the workings of the judicial system.[137]

For Chief Justice McLachlin "the omnipresent and immediate reach of modern dissemination networks makes it increasingly apparent that openness may exact costs -- costs that require judges and the media to reassess the means by which

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[135] Judge, *ibid.*

[136] Sudbeck, *supra* note 118 at 25.

[137] *Ibid.* at 66.

they further the principle of open justice."[138] One of the four costs she listed is privacy and she mentioned:

> When a matter is submitted to the courts of justice, the parties cannot expect that the details of their dispute shall remain private. [...] In the past, technical barriers to the mass collection and distribution of information offered limited but effective protection of privacy of participants in the justice system. Now that protection has disappeared.[139]

In order to protect the privacy of complainants, administrative agencies and boards have adopted policies to limit the disclosure of information. For example, the Privacy Commissioner of Canada will not publish the name of the complainants or the parties involved.[140] In Saskatchewan, the Information and

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[138] McLachlin, *supra* note 9.

[139] *Ibid.* The other costs listed were:
1. Trial Fairness: "[...] one of the purposes of the open court principle is to protect trial fairness by preventing abuses of judicial authority. Paradoxically, in some cases, openness can operate to impair trial fairness and, in particular, finding an impartial jury."
2. Sensationalisation and Distortion: "Openness and public reporting on court proceedings is essential to information the public about the operation of the courts, their role in a democratic society and the rights and obligations of all citizens. In the modern context, however, unlimited reporting of court proceedings risks sensationalisation and distortion."
3. Security: "Post September 11, the issue arises of limits placed on the openness of judicial proceedings under anti-terrorist legislation."

[140] In her 2005-2006 Annual Report, the Privacy Commissioner of Canada reports on Federal Court of Canada dockets dealing with the *Privacy Act*. In her report, she writes: "The following applications and appeals were filed in the past fiscal year. In keeping with our mandate, we have chosen not to reproduce the official style of cause of the cases in order to respect the privacy of the individual complainants. We are listing the court docket number and the name of the government institutions only." <www.privcom.gc.ca> Knowing that these names are available at the court registry and the Federal Court's website: What is the Privacy Commissioner suggesting? The names of the parties in the style of cause are not something public? Is the disclosure of the names of litigants before a public court of justice something private?

Privacy Commissioner decided that an administrative tribunal, Automobile Injury Appeal Commission, should not make its records available to the public.[141]

C. Response to Justifications in Favor of Practical Obscurity

Despite the points that may be made in its favour (i.e. data mining, criminal uses, loss of forgiveness and effects on the repute of the administration of justice), practical obscurity is not a defensible basis for protecting court records from electronic access. None of the justifications withstand my analysis which is based on six points: 1. concept; 2. model; 3. jurisprudence; 4. consequences; 5. access; and 6. motives.

1. Conceptual Confusion: "Quantity to Quality"

> The greatest tool in the history of mankind [Web] toward promoting access is being turned into this demonic force for the invasion of privacy. We're equating ease of access with privacy, and to me they're two different animals. Either a record is private or it's not.[142]

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[141] Saskatchewan, Office of the Information and Privacy Commissioner, Decision 2005-001, January 27, 2005, (Dealing with an administrative tribunal.).
"Summary: The Complainant asked the Commissioner to investigate the practice of the Automobile Injury Appeal Commission of publishing on its website the full text of its decisions. Those decisions include a good deal of personal information and personal health information of those persons applying for compensation. The Commissioner found that there was no legislative requirement that the Commission publish decisions on its website and that such publication falls short of privacy 'best practices'. The Commissioner found that the Commission had failed to adequately protect the privacy of the applicant as it is required to do by *The Freedom of Information and Protection of Privacy Act and The Health Information Protection Act*."

[142] Davis, executive director of the Freedom of Information Centre at the Missouri School of Journalism, cited in Bloom, *supra* note 120 at 28.

On one hand, information (a record) is public but hard to get to, so it is argued that it is private. For Davis this interpretation, taken literally, means that "public documents that are difficult or time-consuming to locate essentially become private records."[143] On the other hand, the information is still public, but with technology we have easier access, and because of this potential increased or facilitated access, it is argued the information is private. This conclusion seems absurd if not oxymoronic. Davis wrote:

> At the heart of this doctrine is the notion of practical obscurity, the Court's belief that public records should be public so long as they are separated by geographic distance and antiquated paper-based systems. Practical obscurity also gives rise to the assumption that computerized compilations of once-obscured records transforms public records into private data thanks merely to the ease with which such records can now be accessed. In an era in which government record keeping is undergoing a fundamental shift from paper to data, the concept of practical obscurity implies an irresolvable conflict between the rather obvious public interest in electronic information and the government's interest in preserving privacy.[144]

For Davis, the concept of practical obscurity is an interest mitigating toward privacy: "The fact that much of that information is compiled, stored and disseminated through computer networks leads to the logical conclusion that the

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[143] Davis, *supra* note 126 at 18. See also Martin E. Halstuk, "Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases" (Annual Convention of the Association of Education in Journalism and Mass Communication, August 1998) at 12.

[144] Davis, *ibid.* at 16.

more government documents created electronically, the greater the "practical obscurity" of the data."[145]

If information is filed in court, the information becomes public unless a confidentiality order is issued. Until the present time, all the information was available in paper format at the court registry and no privacy interest was ever raised; now, with the potential facilitation of access, privacy interest is argued to limit access. This line of thought weakens or simply ignores the importance of open court principle discussed above. I think that the concept of practical obscurity is flawed in that difficulty of access doesn't equate to a privacy interest.

2. Individual Model Versus Community Model

The context of disclosure is important and must be taken into consideration. Personal information provided to a private organization or to the government must be disclosed and used in accordance with the laws. In such cases, the legislation based on the fair information principles severely limits the use and disclosure of personal information to the extent needed for the service to be provided to the particular individual.[146] But, we must be careful not to export that

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[145] *Ibid.* at 18.

[146] Judge, *supra* note 8 at 17, 23-25. Professor Judge discussed the need for a balance between privacy and public access to court records. She wrote:

paradigm into a context where it does not belong. Personal information disclosed for justice purposes is made for different considerations. There is a distinction between providing personal information to a private organization or a government in order to receive goods or services, and providing personal information to a court of law to obtain a decision that can be enforced by the Power of the State.

"Posing the question as whether the courts should make information available in an electronic format and whether that information should be accessible remotely addresses the issues only obliquely. The practical obscurity of past technology limits does not give us a basis for continuing to distinguish between paper and Internet media. The issue is not "paper version electronic media" or "on-site version remote access". Instead, the issue is what personal information should be collected by the courts at all, and of that information which is justifiably collected, what information in court records should be "public" because it serves public functions. This approach borrows from the fair information principles the idea that access and purpose are linked. The fair information principles incorporate the theory that defining purpose for the use and collection of information will in turn work to limit the collection and use of information."

She made ten recommendations:

1) the same access policy should apply to electronic and paper media, and to remote and on-site sources;
2) sensitive personal information subject to mandatory disclosure and discovery information should be evaluated as to whether the courts require the information to be collected at all;
3) the definition of "public" court record and "public purposes" should be carefully articulated;
4) on access, some information should presumptively be public;
5) the designation of presumptively personal information should be applied at the level of specific kinds of information;
6) information that is presumptively private should be protected regardless of the resources of the requesting party;
7) privacy-enhancing technologies should be incorporated where appropriate;
8) the fair information principles are a useful model but cannot be applied too literally to court records;
9) the privacy of users of public records should be respected;
10) although generally use restrictions are not a good idea, one exception is bulk copying and combining of public records for commercial purposes or reselling.

In 1994, the Canadian Institute for the Administration of Justice hosted a National Conference on Open Justice in Ottawa.[147] At this Conference some speakers proposed more and some proposed less openness. One interesting paper titled "Electronic Public Access – An Idea Whose Time Has Come" was presented by Daniel J. Henry. Instead of promoting limits to the principle, the author wrote:

> Traditionally, there is no privacy right in court. It is difficult for it to exist there. Public information important to an understanding of a case cannot be subdivised into semi-private and public categories without seriously undermining public access to court proceedings. Opponents often presume that electronic coverage has a more powerful and prejudicial effect, but they offer no proof for that assertion."[148]
>
> "Informed consent" is a concept suited to surgery, not justice. Surgery is an individual matter. Justice is a community event. [...] Should an individual involved in a case, in whatever peripheral or substantial way, have a right to "veto" over public access to electronic information about that case? Logic and law suggest not.[149]

In our fervor to stop new forms of personal nuisance like spam mail or crimes like identify theft, which can be facilitated by technology, we are preparing to throw the baby out with the bathwater by endeavoring to stop the circulation of personal information which is imperative for justice to operate and to function. Regarding the community needs, Trudel made a point that can be applied to the information in the judicial system:

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[147] Canadian Institute for Administration of Justice, *Open Justice – La transparence dans le système judiciaire*, papers presented at a conference held in Ottawa, October 1994 (Montréal: Les Éditions Thémis, 1994).

[148] *Ibid.* at 423.

[149] *Ibid.* at 428.

> Moreover, the notion of personal life leaves little space for the requirements of life in society, for the fact that information has to be able to circulate in the name of the interests of the community or for the fact that such circulation is, in practice, rarely harmful. If everything depends on personal choice, then there remains little room for circulation of information in order to meet the needs of the community.[150]

Again, I draw the same parallel between secrecy in the administration of justice and secrecy in government. Professor Francis E. Rourke observed that:

> insofar as secrecy in government seriously impedes the free flow of communication among citizens, it constitutes a real threat to the informed public discussion that is at the core of democracy. Where this occurs, it is not at all certain that a community should not choose, from the point of view of its own value system, to tolerate some measure of insecurity in order to gain access to information it needs in order to exercise influence over decisions on vital matters of public policy.[151]

Based on the above discussion, I am of the opinion that insofar as secrecy in the judicial system can seriously impede the necessary flow of information between the citizen and the courts, it constitutes a real threat to the informed public discussion that is at the core of democracy and the administration of justice. Where this occurs, it is not at all certain that a community should not choose, from the point of view of its own value system, to tolerate some measure of insecurity or embarrassment (encroachment of privacy) in order to gain access to information it needs to ensure justice is being done.

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[150] *Ibid.*

[151] Rourke, *supra* note 114 at 226.

3. Contradicting Jurisprudence

Krushell[152] is in direct opposition with a decision issued by the Federal Court of Canada in 1997[153] and a decision of the Ontario Superior Court issued in 2002[154]. As seen above, the Court in *Krushell* held that privacy was protected by the physical inconvenience of attending each courthouse.[155]

In the Federal Court case, an access request had been made to obtain disclosure of the names of former Members of Parliament in receipt of pension benefits pursuant to the *Members of Parliament Retiring Allowances Act* (the MPRA). The applicant submitted that the requested information was "publicly available", but the respondent disagreed on the basis that the requested information did not exist in a complete and final form, and needed to be collated from several sources. The Court held:

> I find that the Minister erred in determining that the requested information is not a matter of public knowledge. A person may visit the Library of Parliament and request the Canadian Directory of Parliament, which is a list of all former members of Parliament with the day they were first elected.

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[152] *Krushell, supra* note 125.

[153] *Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), supra* note 122.

[154] *Gombu v. Mitchinson et al.* (2002), 214 D.L.R. (4th) 163; 59 O.R. (3d) 773 (Ont.Div.Ct.) [leave to appeal granted, [2002] O.J. No. 3309 – the appeal was subsequently abandoned].

[155] *Krushell, supra* note 125 at para. 50.

> The fact that a person needs permission to use the Library of Parliament, as submitted by the respondent, does not detract from the public availability of the requested information. Moreover, the requested information may be gleaned from other sources, such as a Who's Who of Canada, old copies of newspapers, or Elections Canada which is required by law to keep the results of all federal elections.[156]

Along the same line of thought, in 2002, the Ontario Superior Court of Justice allowed access to an electronic databank to facilitate the research of the Toronto campaign contribution records from the 1997 municipal election.[157] The court rejected the view taken by the Commissioner on the dangers of misuse of the database noting that danger of misuses exists even with the paper version presently available to the public.[158]

I prefer the more pragmatic approach taken in the Federal Court and the Ontario Superior Court decisions. In both cases, courts considered the public availability of the information from different public sources and formats. In my opinion, the Court in *Krushell*, which specifically dealt with court information, erred in its reasoning because it did not consider the importance of the open court principle.

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[156] *Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services)*, *supra* note 122.

[157] *Gombu, supra* note 154 at para. 31: "I accept the position of the applicant that the only way that he can meaningfully scrutinize the information about campaign contributions is through the electronic database. Public scrutiny of the democratic election process and the integrity of the process governing political campaign contributions is a matter of significance public importance. In my view, in light of the fact that all but the telephone numbers of the contributors is already required to be disclosed, the public interest in disclosure of the database to enable meaningful scrutiny of the democratic process clearly outweighs other considerations."

[158] *Ibid.* at para. 26.

The Court imposed limitation on access to court information based on irrelevant considerations:

> The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the de facto punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. Same-day internet postings would create concern about courthouse security and judge-shopping which could affect the administration of justice [...].[159]

The Court does not state the same is true if the information is publicly available in paper format.

4. Hypothetical Negative Consequences

The potential negative consequences (e.g. criminal activities) identified by proponents of practical obscurity are mostly hypothetical and downplay the fact that the information could already be misused in its current format (i.e. paper). The negative consequences are possible or projected risks (some of which are associated in living in an open and just society).

I have identified two categories of negative consequences, (1) inconveniences or nuisances (e.g. gossip) and (2) illegal or criminal actions (e.g. defamation,

[159] *Krushell, supra* note 125 at para. 49.

identify theft, stalking). The risks identified which serve to support more secrecy in the judicial system are unlikely and can be discounted on the basis that these are normal and usual risks expected by any citizen living in a democratic society. When we walk, speak or interact in public, there is always a risk for gossip and of attendant illegal and criminal actions, but these risks should not prevent us of enforcing sound principles like openness of the courts. Unless there is clear and actual evidence brought before the court that security is at stake then openness must prevail.

Trudel wrote:

> fear about possible misuses of information have led to drastic restrictions on how information can be accessed. Access to data now depends on the real or supposed purposes underlying their public nature. Thus, public information is censured because there is a risk (most often hypothetical) that it could be misused.[160]

Although Trudel dealt with government information, his reasoning may also be effectively applied to the courts' information. We must accept that for the requirements of life in society, personal information must circulate. Hypothetical risk cannot justify secrecy; the risk to the credibility of the justice system is too high. Privacy limitations are not like the speed limit on a highway or the number of passengers a plane can safely accommodate. If, for our safety, personal

[160] Trudel, *supra* note 115 at 10.

information contained in courts' records must remain confidential than we might as well look at removing all the knives from everyone's kitchens.

5. Practical Obscurity Protects Uneven Access

What is feared is the disappearance of the somewhat illusory protection offered by practical obscurity. In fact, practical obscurity offered no protection, it was protecting only privileged access. Only those individuals or organizations with unlimited time or resources, could easily and rightfully access any locations to gather the data to build information banks for their own purposes. If practical obscurity was an integral privacy safeguard, it was a very poor one, and also very discriminatory. Only an individual or organization with plenty of time and money could. Practical obscurity notwithstanding, the information was public and was available.

If we decline to embrace technology, we are effectively destroying a great tool for democratization of our public institutions and once again, only wealthy and powerful people or organizations will have the means to access information. Practical obscurity doesn't protect privacy as much it protects privileged access.

6. Improper Motives

Advocates for more restrictions on the disclosure of personal information often state this personal information is not necessary (or required) for the purpose for which the courts make their information available. Donald J. Horowitz wrote that:

> The purpose of the right of access to court information and records has been authoritatively described as to "allow the citizenry to monitor the functioning of our courts, thereby ensuring quality, honesty, and respect for our legal system." It is not for commercial purposes, gossip, or other reasons not relevant to public oversight of the judicial system.[161]

He reported that the *Access to Justice Technology Bill of Rights Committee* "believes that unless there is some appropriate but not overdone protection of personal privacy and intimate personal, health, financial, and other appropriate information, people will be increasingly reluctant to exercise their right to access to justice, and will avoid the justice system when possible."[162]

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[161] Donald J. Horowitz, "Technology, Values, and the Justice System: The Evolution of the Access to Justice Technology Bill of Rights" (2004) Washington Law Review, Vol. 79:77 at 95.

[162] *Ibid.*

This sort of argument was made to support the adoption of s. 276 of the *Criminal Code*.[163] The law offers a shield to the victim to protect his/her privacy in a rape trial. The central purpose doctrine and the fear factor, potential misused of personal information, are often the basis for claiming more privacy.

The purpose or the motivation of an individual accessing a court record should not be relevant. I refer to the Supreme Court decision *Canada (Information Commissioner v. Royal Canadian Mounted Police Commissioner*. In that particular case, an individual had requested access to all the positions occupied by specific RCMP members. The request was denied. Gonthier J., writing for the Supreme Court, noted that the Court of Appeal explained the request could not be a "fishing expedition" about all or numerous positions occupied by an individual over the span of his or her employment, because this would empty the meaning of s. 3(b) of the *Privacy Act*, which prevents access to "employment history". Gonthier J. viewed this interpretation as unnecessarily restrictive and without sufficient legal foundation. According to Gonthier J., the Court of Appeal's approach failed to recognize it is the nature of the information itself that is relevant – not the purpose or nature of the request.

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[163] Cameron, "Victim", *supra* note 35. See Nicole Baer, "Striking the Balance in Sexual Assault Trials", online: <http://www.justice.gc.ca/en/dept/pub/jc/vol1/no1/strike.html>:
"The Supreme Court of Canada affirms Parliament's approach to a delicate challenge: balancing the right of an accused to a fair trial with the privacy and equality rights of the sexual assault complainant (who is invariably called as a witness at the trial)."

The *Privacy Act* defines "personal information" without regard to the intention of the person requesting the information. Similarly, s. 4(1) of the *Access to Information Act* provides that every Canadian citizen and permanent resident "has a right to and shall, on request, be given access to any record under the control of a government institution". This right is not qualified; the *Access to Information Act* does not confer on the heads of government institutions the power to take into account the identity of the applicant or the purposes underlying a request. In short, it is not open to the RCMP Commissioner to refuse disclosure on the grounds that disclosing the information, in this instance, will not promote accountability. The *Access to Information Act* makes this information equally available to each member of the public because it is thought the availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes.[164]

Although the above analysis deals with FOIP legislation, the same reasoning can be applied to the judicial system and more particularly to disclosure of court's records. The identity of the individual accessing the information or the purpose underlying his access should not be taken into account unless there is a specific

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[164] *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8 at paras. 31-33.

order on file setting out the modalities of access or non-access.[165] Again in the judicial context, we should not adopt the fair information practices which "incorporate the theory that defining purpose for the use and collection of information will in turn work to limit the collection and use of information."[166]

In the end, the principles of access remain the same; technology does not matter. If there is no problem for one, ten or even fifty individuals to watch court proceedings or see court records, why is there a problem for one million? Silverman is of the opinion "public access to court files and documents over the Internet should be permitted to the same extent that the public has access to them in the courthouse – that is, court should not discriminate with respect to methods of access."[167]

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[165] Other means can also be used to regulate the information outside of access rules – e.g. *Criminal Code*.

[166] Judge, *supra* note 8.

[167] Silverman, *supra* note 64 at 220. To defend his position, he has parsed the information in a case file into two general categories: sensitive personal information and narrative adjudicatory facts. With regard to the first category, he argues that "[…] for reasons of public safety and personal security, the public should not have access to it either at the courthouse or over the Internet." With regard to the narrative adjudicatory facts, he further subdivides it into discrediting and embarrassing facts, implicitly recognizing a third subcategory containing all others. He argues that "neither discrediting facts nor embarrassing facts, nor indeed facts that are both discrediting and embarrassing, provide sufficient grounds for limiting public access to court records over the Internet while permitting unlimited access to them at the courthouse."

Chapter V. Solution for a Reasoned Access to Court Records

The difficulty raised with the increased use of technology and with the creation of electronic records is that the information is now accessible in new ways (i.e. remotely) and search engines now allow for more specific search and linkages. The question is: shall we embrace this new technology or should we, against practical and pragmatic wisdom, expand the current practice of practical obscurity? It is my opinion the solution is that a generalization of the *Dagenais* test be applied to all circumstances in which privacy protection is sought. As the Supreme Court of Canada mentioned in *Vancouver Sun*: "The open court principle, to put it mildly, is not to be lightly interfered with."[168]

With a better understanding of the open courts principle and current context of court information, I propose a process which can be used to balance the open court principle and the need for confidentiality. The proposed process recognizes that openness usually serves the public interest unless there is a proper demonstration to the contrary. As an introduction to my solution, I use the following excerpt taken from *R. v. Laws*, in which the Ontario Court of Appeal stated:

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[168] *Vancouver Sun*, *supra* note 32 at para. 25.

> Trial judges are entitled to maintain a discretion to exclude members of the public when circumstances warrant. However, this discretion should not be exercised arbitrarily. Furthermore, the discretion should not be exercised in the absence of an evidentiary foundation and must be exercised in accordance with the *Charter*.[169]

This is consistent with my proposed solution: 1) The determination should be done by judges in the course of specific cases at the initial stage of filing or at least before the conclusion of litigation, rather than by administrators; 2) The guiding principle should be openness; 3) If there is a need for an exception, it should be considered on a case-by-case basis.

A. Determination to be Made by Judges

Courts have been exempted from FOIPP legislation. I argue it should be left to the discretion of the judge, who relying on proper evidentiary basis provided by the party moving for confidentiality, will decide if the information should be kept secret forever or for a specific period of time. As it was written in the United Kingdom, exempting courts from FOIP legislation "ensure[s] that the courts can continue to control the disclosure of that information in the proper exercise of their jurisdiction."[170] No problem will arise because based on their experience and their functions, judges are in the best position to make this determination;

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[169] *R. v. Laws* (1998), 165 D.L.R. (4th) 301 (Ont.C.A.) at para. 21.

[170] Department of Constitutional Affairs, *supra* note 16.

only judges (as opposed to administrators) have sufficient knowledge, training and experience to balance opposing interests.

In the United States, relying upon the discretion of judges has not caused any problems with regard to civil case files:

> Providing remote electronic access equal to courthouse will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential to their case to file certain documents containing private sensitive information or by the use of motions to seal and for protective orders. It will also depend upon the discretion of judges to protect privacy and security interests as they arise in individual cases. However, it is the experience of the ECF (Electronic Case Filing) prototype courts and courts which have been imaging document and making them electronically available that reliance on judicial discretion has not been problematic and has not dramatically increased or altered the amount and nature of motions to seal. It is also the experience of those courts that have been making their case file information available through PACERNet that there have been virtually no reported privacy problems as a result.[171] [underlining added]

Dennis J. Sweeney reminded us "regardless of the form principles ultimately assume – court rule, legislation, or uniform code – it will be through common law courts and common law processes that they ultimately become part of the fabric of our legal culture."[172] [underlining added] Using the analogy of law as a tortoise and technology as the hare, he wrote that because common law develops slowly

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[171] Judicial Conference Committee on Court Administration and Case Management, "Report on Privacy and Public Access to Electronic Case Files"' (June 26, 2001) at 6-7.

[172] Dennis J. Sweeney, "The Common Law Process: A new Look at an Ancient Value Delivery System" (2004) Washington Law Review, Vol. 79: 251 at 253.

and uncertainly, there was a need to import values into the judicial process for application to everyday conflicts generated or complicated by technology.[173]

Discussing the balancing of access and privacy in judicial proceedings, Winn wrote:

> While courts are vigilant in protecting the public right of access when it is consistent with ensuring the credibility of the judicial system, they are also quick to protect individuals from the exploitation of their personal information when it bears little relationship to ensuring the integrity of the judicial process. This common law and constitutional balance, carefully worked out on a case-by-case basis over the course of many years, represents the finest form of judicial lawmaking. While a system that relies on the discretion of judges sometimes runs the risk of occasional inconsistent decisions, by and large, courts have shown that they are capable of exercising their discretion to carefully weigh competing interests, and their decisions show great nuance, factual subtlety, and legal imagination.[174]

I would say decisions are shaped by submissions of the parties. In addition to the necessary role of the judge, lawyers also play a critical role. These actors must balance and find the right equilibrium between the need for openness and the protection of individuals.

Balancing divergent interests is part of the day-to-day business of the courts across the country. For example, on February 27, 2006, a judge from the Provincial Court of British Columbia decided that the law of British Columbia

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[173] *Ibid.* at 255.

[174] Winn, *supra* note 118 at 313-314.

allows the press to report on the evidence of a *voir dire*, subject to appropriate limitations.[175] On May 3, 2006, a judge of the Ontario Superior Court decided that disclosure of anonymous information in the case would not be contrary to the law since there is no evidence that there is a real and substantial risk.[176] Finally, on May 31, 2006, a judge of the Provincial Court of Nova Scotia held that the media and the public should be granted access to exhibits filed in a trial of a young offender who received an adult sentence.[177]

B. Orientation

The general rule is openness and the exception is confidentiality. The open court principle is at the root of our judicial system, but in some circumstances openness must be balanced with the need to preserve confidentiality where disclosure of information would be contrary to the proper administration of justice. As mentioned by Winn: "Experience teaches us that at times, open judicial proceedings can ensure, rather than prevent, the abuse of judicial power, can create unacceptable risks of a miscarriage of justice, and can cause unnecessary harm to the safety and privacy of individuals."[178]

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[175] *R. v. Yu*, 2006 BCPC 0121 at para. 23.

[176] *K.B. et al. v. Toronto District School Board et al.*, Court File Nos.: 55/06 and 06-CV-304058, May 3rd, 2006, Ontario Superior Court of Justice – Divisional Court, Chapnik J. at 8.

[177] *R. v. A.A.B.*, 2006 NSPC 16 at paras. 17-18.

[178] Winn, *supra* note 118 at 308.

In *Toronto Star Newspaper Ltd.*, Fish J. reminded us that freedoms are not absolute and that under "certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of the system of justice."[179] According to Fish J., "public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*"[180]

C. Dealing with Exceptions to the General Rule

Exception to the rule of openness should be determined on a case-by-case basis. James M. Chadwick, a lawyer in the United States, is of the opinion that "courts should resist the temptation to engage in broad categorical restrictions on electronic access to court records, and instead should rely on the existing process of careful, case-by-case consideration of the propriety of sealing court records."[181]

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[179] *Toronto Star Newspaper Ltd., supra* note 86 at para. 4.

[180] *Ibid.*

[181] James M. Chadwick, "Access to Electronic Court Records: An Outline of Issues and Legal Analysis", Gray Cary Ware & Freidenrich LLP, California (not dated) at 17.

In a presentation made in 2003, Chief Justice McLachlin discussed the multiple options available to balance the values at issue. She mentioned the hierarchical approach but is of the opinion this is not workable in an era of modern communication technology. It seems openness must be 'nuanced' because more risks exist. She suggested a better approach which she calls 'contextual balancing'.[182] McLachlin C.J. explained that under this approach:

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[182] McLachlin, *supra* note 9:

"The values that ultimately underlie the open court principle are of fundamental importance. So are the competing interests of the right to privacy, fair and impartial trials and accurate public information equally significant. The question is how the tension between these values is to be resolved.

One way to resolve the tension is the hierarchical approach. The open court advocate, on this approach, asserts as a fundamental principle that courts must be open, and that other goods, like privacy, fair trials by jury and accurate reporting, as lesser goods, must always yield to the open court principle.

In Bentham's time, such a position might have been workable. However, in the era of modern communication technology, the gravity of the harms that unlimited openness may permit demands a more nuanced approach.

The better approach today is to acknowledge that the open court principle may conflict with other values, and seek to resolve the tension by contextual balancing. On this approach, the principle that the courts administer justice openly and in public, like so many other fundamental axioms of our law, is not viewed as absolute. In reality, the conflicting interests are not so diametrically opposed as we might think. Protecting the privacy of victims is important to a good justice system. So is fair trial by jury and respect for judges. Instead of standing in opposition, these are all components of a good justice system. It is not a matter of all or nothing, one or the other. It is rather a matter of finding the right equilibrium, or balance, on a contextual and case-by-case basis.

The Supreme Court of Canada laid out a balancing test for open court issues in *Dagenais v Canadian Broadcasting Corporation*. It suggested that alternatives to bans should be considered such as trial adjournments, change of venue, sequestration of the jury, allowing challenges for cause and *voir dires* during jury selection, and strong judicial instructions. The Court has subsequently reaffirmed the propriety of this balancing approach in both the criminal and civil matters.

The Canadian experience demonstrates that balancing, in the context of the open courts principle, requires identification of the precise values that are at stake – confidence in the administration of justice, judicial accountability, the importance of accurate public information, privacy, and fair and impartial trials. Balancing requires an evaluation of how each value plays out in the precise circumstances of the case. It requires us to examine the benefits that would accrue as well as the harm that would be caused to each value by unlimited openness or by restrictions on publicity. The aim of the balancing exercise is to protect each of the conflicting values to the greatest degree possible and achieve harmony or an equilibrium between them."

> The court seeks to tailor a solution that protects privacy and fair trial rights, while preserving the values that underlie the open justice principle. This is a complex exercise, one that leads to different solutions in different contexts. Ultimately, however, it offers the only principled way by which judges can resolve the legitimate and competing demands of openness, privacy and fairness.[183] [underlining added]

McLachlin C.J. favors a case-by-case approach instead of generalized rules.

I think a far better choice is to have the judge decide what information is not to be made publicly available rather than create rules which will add another layer of administrative issues. That discretion would be guided by a proper test which would recognize the fundamental role played by the open courts principle in the proper administration of justice. The adoption of easy solutions or standards based on a presumption of harm due to development of different new technologies and applicable to all cases should not guide the court when determining what not to disclose.

Of course, if judges decide on a case-by-case basis, the door is left open for different rulings. However, with time and the refinement of knowledge on the issues, the best solution will surface. Judges are best suited to deal with individual requests because they have ready access to the specific facts of each case. If justified, a ruling made by a judge can be appealed to a higher court.

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[183] *Ibid.*

D. Process and Criteria

The determination regarding the confidentiality of documents will be part of the ordinary litigation process. It will be the responsibility of the parties to raise any concerns with regard to information filed with the court and the determination will be made and will have effect for an indeterminate period of time or can be revisited after a specific length of time.

1. Burden

A party claiming confidentiality should always have the burden of demonstrating need and should have to make representations as to why secrecy is preferable to openness in the specific case.[184]

The Alberta Law Reform Institute noted "despite the theoretical parity of disclosure and non-disclosure interests, balancing allocates a burden", and "those urging restrictions bear the burden of persuasion", since "covertness is the exception and openness the rule."[185]

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[184] Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) Canadian Bar Review, vol. 80, p. 299 at 347.

[185] *Ibid.* at 10. Currently, there are rules that provide for the opposite. For example s. 13 of the *Code of Civil Procedure* in Quebec provides that: "However, in family matters, sitting in first instance are held in camera, unless the court, upon application, orders that, in the interests of justice, a sitting be public."

In the United States, Karen Crist wrote that a balancing test respecting anonymization of plaintiffs' identities was first developed in 1981: "In that case the court stated that, in making a decision as to whether an anonymous filing is appropriate, a court should weigh the public's and the defendant's interests in full disclosure against the arguments for shielding a plaintiff's identity."[186] She listed five policy considerations encouraging full disclosure but I believe the most important to be the following: "In order to tip the scales away from these important interests in disclosure and in favor of plaintiff anonymity, there must be compelling, countervailing reasons for protecting the identity of the plaintiff."[187] The burden of proof rests with the person requesting an exception to the principle of openness. Evidence in support of secrecy must demonstrate that secrecy is needed to prevent probable reasonable harm to an individual.

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[186] Karen Crist, "Plaintiff Anonymity: Filing Civil Suits Under a Pseudonym", *Moving Forward Newsjournal*, Volume 4, Number 1, October 1998, online: <http://movingforward.org/mfv4n1legal.shtml>.

[187] *Ibid.*:

1) The presumption of judicial openness and an acknowledgment that public scrutiny of the judicial process is inherent in the First Amendment.
2) The expectation then is that courts are public places and people who avail themselves of the courts should expect to do so publicly.
3) Our concept of fairness suggests that if a defendant's name is made public, the plaintiff's should be as well.
4) In addition to the public's interest in openness, the defendant also has a strong interest in knowing the plaintiffs identity. In most cases, a defendant has a right to know who is suing him or her.
5) In order to tip the scales away from these important interests in disclosure and in favor of plaintiff anonymity, there must be compelling, countervailing reasons for protecting the identity of the plaintiff.

Based on the Canadian case law dealing with public access to courts, exceptions to publicity should be justified by evidence explaining clearly the rationale exempting each record and this evidence of harm must be more than merely speculative.

Basing my approach on the rule governing the issuance of a publication ban developed by the Supreme Court of Canada in *Dagenais*[188], access to court information should only be denied when:

> (a) such refusal is necessary to prevent a real and substantial harm to the life or reputation of a party or witness, because reasonably available alternative measures will not prevent the risk; and
> (b) the salutary effects of secrecy outweigh the deleterious effects to the open courts principle.

2. Objective Served by Non-Disclosure

To justify secrecy there needs to be some pressing and substantial objective. Additionally, the objective must further the realization of collective goals of fundamental importance.[189] What are the pressing and substantial objectives in

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[188] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 878.

[189] Martin, *supra* note 184 at 340:

protecting privacy – to avoid embarrassment or protect the life of someone? Of the four criteria identified by Etzioni for determining whether privacy concerns and the common good are out of balance, the primary criterion, as I am of the opinion that the common good is served by the open courts principle, is:

> (1) First a well balanced, communitarian society will take steps to limit privacy only if it faces a *well-documented and macroscopic threat* to the common good, not a merely hypothetical danger. (The phrase "clear and present danger" comes to mind, but for those who are legal minded it implies a standard that is too exacting for the purposes at hand.)[190]

It must be shown that restricting openness will prevent the stated eminent and probable harm to the parties or witnesses and will foster the public interest by allowing the proper administration of justice.

From different sources (U.K. – Department of Constitutional Affairs[191], Karen Crist[192], and ss. 276(3) *Criminal Code*[193]), I have identified two main categories

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"In Oakes the Court held that a valid objective must accord with the values of a free and democratic society and must "relate to concerns which are pressing and substantial" before it is of sufficient importance to override a constitutionality protected right. A valid government objective must also be intra vires and further "the realization of collective goals of fundamental importance. It is at this stage that the Court faces the issue of balancing the worth of equality rights against the worth of government policy."

[190] Etzioni, *supra* note 96 at 12.

[191] Department of Constitutional Affairs, *supra* note 16.

[192] Crist, *supra* note 186.

[193] *Criminal Code*, ss. 276(3):

"(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

of threats in which non-disclosure might be warranted; (a) threats of physical, social or economic harm, and (b) threats which will prejudice the administration of justice.

a) Threats of physical, social, or economic harm

There are risks associated with any actions in life, eating, flying, driving, and so on, however, requesting easier access to court information should not one of them. If it is clearly demonstrated that risk exists and justice will not be served by making information available, then non-disclosure is justified. Crist wrote:

> While there is no absolute right to anonymously seek redress for grievances in a court of law, anonymity is permitted where it is justified to protect the plaintiff from threatened harm or from public disclosure of intimate and personal matters [e.g. personal information about sexuality, sexual conduct and family relations, homosexuality, transsexuality, pregnancy, childbearing, abortion, and contraceptives]. Certainly it should be justified in cases involving plaintiffs who are victims of crime.[194]

(*a*) the interests of justice, including the right of the accused to make a full answer and defence;

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant."

[194] Crist, *supra* note 186.

On the last point, I argue that the need for anonymity or non-disclosure of information must be demonstrated. Just because a victim of crime appears in court, information should not automatically be kept confidential.

Lastly, Winn suggested that "in ruling on motions to protect personal information from online invasions of privacy [...] the *Westinghouse* test may prove to be a model of how courts may have to determine what type of information parties should be permitted to protect."[195] I argue that this test should not be used because it proposes to treat the court information differently depending on the format, and proposes a necessity criterion. This necessity criterion approach is also found in the CJC's Policy and I will elaborate on this in Chapter VI.

b) Threats to the administration of justice

When a non-disclosure decision is made, the following criteria must also be taken into account:

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[195] Winn, *supra* note 118 at 326-327. The test is as follows:

- Is it the type of information that society as a whole is prepared to recognize as involving a reasonable expectation of privacy?
- What is the potential for harm to the person in the disclosure of that information?
- What is the potential for harm to the relationship in which the information was generated (that is, is there any confidential relationship involving broader societal policies protecting those relationships)?
- What safeguards can be but in place to protect the information in electronic form in the courthouse or remotely?
- What procedures add criteria should there be for allowing access in specific instances to otherwise confidential or private information, or in specific instances protecting sensitive or private information when it would otherwise be publicly accessible?
- And finally, what is the need for access of the public and the press?

1) the ability of a judge to deliver justice effectively, fairly and fearlessly in a particular case;
2) the ability of a judge, or of the judiciary, to perform this function more generally;
3) the business of running of the courts and tribunals [...];
4) the enforcement of sentences and the execution of judgments;
5) the ability of litigants to bring their cases, or a particular case, to court;
6) the prospects of a fair trial taking place.[196]

In some occasions, openness will yield to the other imperatives. The inclusion of these considerations into a decision for non-disclosure helps to demonstrate the rationality of the decision.

3. Rational Connection

At this stage we must also verify if the objective has been pursued in a rational manner and that the exception or ban is well designed, arbitrary, unfair or based on irrational considerations.[197] The restriction will be justified if it promotes the objective(s) pursued.

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[196] Department of Constitutional Affairs, *supra* note 16.

[197] Martin, *supra* note 184 at 344:
"At this stage the Court is asked to question whether the government has pursued its objective rationally; meaning whether the legislation is well designed, arbitrary, unfair or based on irrational considerations. Under the rational connection test the focus is on whether the government is proceeding rationally in the sense that there is some logical connection between the means it has employed to pursue its desired end. Some authors predicted that it would be conceptually difficult to establish that a law was irrational and generally speaking, it is not very difficult for government to establish some rational connection between its end and means."

4. Minimal Impairment

In my opinion, two of the four criteria identified by Etzioni for determining whether privacy concerns and the common good are out of balance must be taken into account at this stage. I reformulate the two criteria as follows:

- The availability of means to mitigate a danger, other than restrictions on the openness of court records.[198]
- Whether restrictions on openness are as limited as reasonably possible.[199]

The means must impair the basic principle as little as is reasonably possible. How might the objectives be achieved without limitations on openness?

The basic principle being openness of the courts, the exceptions must be strictly interpreted. Maximum disclosure must always be preferred to partial disclosure, and partial disclosure using such techniques as severing, should always be used instead of total secrecy, where applicable.[200] This secrecy need not to be

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[198] Etzioni, *supra* note 96 at 12: "(2) The second criterion is to look at how carefully a society acts to counter a tangible and macroscopic danger without *first resorting to measures that might restrict privacy*."

[199] *Ibid.* at 185-186. "(3) The third criterion points to the merit of minimally intrusive interventions."

[200] *Rubin v. Canada (Mortgage & Housing Corp.)*, [1989] 1 F.C. 265 (Fed.C.A.) at 271.
See also Martin, *supra* note 184 at 346:
"The Oakes test initially required that any impairment should be 'as little as possible'. According to a general study of all Charter cases between 1986-1997, Professor Trakman et al. finds that the minimal impairment test has been pivotal to section 1 analysis and Professor Hogg calls it "the heart and soul of section 1 justification."

indefinite; sometimes the proper administration of justice will be served by a temporary ban on the information. Temporary secrecy should always be preferred to indeterminate secrecy.

5. Positive Effects vs. Negatives Outcomes

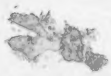
Once the exemption is found to be rationally connected to the legitimate objective pursued and a minimal impairment to the principle of openness, the decision-maker must take into consideration the effects of such confidentiality. The positive effects of the principle must be measured against the possible negative consequences. Confidentiality of information based on an injury test is a good balance between the need for secrecy and the need for openness. Etzioni's fourth criterion, "whether the suggested changes in law and public policy should include treatments of undesirable side effects of the needed interventions"[201] is useful at this state to determine whether privacy concerns and the common good are out of balance.

Examples of negative effects might include: non-access to pertinent information wherein a citizen is denied access to information about a future partner (name, address, list of prior actions or criminal convictions); a future spouse is denied access to a fiancé's divorce record (name, address, name of former spouse, name

[201] Etzioni, *supra* note 96 at 185-186.

of children, reason for divorce); a credit company is denied access to information about a potential borrower (list of actions pending, liabilities); a citizen interested in intervening in an action is denied access to the relevant information in the court file; a citizen wants to verify if all the facts contained in a witness' sworn affidavit are true to his knowledge.

We should be careful not to adopt automatic secrecy as a rule. James M. Chadwick wrote that "rules that properly balance this interest [privacy] against the public's right of access to court records cannot be premised on an analysis that essentially ignores the vital public interests that public access to court records serves."[202]



To reiterate, the following guiding principles and criteria should be taken into account when a decision may limit the open courts principle:

1) Privacy is not an absolute and all encompassing right.
2) Trial in open court is fundamental to the administration of justice in Canada, but is not absolute (may have some exceptions).
3) The public domain requires a healthy flow of personal information.
4) The public interest in open trials is rooted in the need:
    i) to maintain an effective evidentiary process;
    ii) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society;
    iii) to promote a shared sense that our courts operate with integrity and dispense justice; and

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[202] Chadwick, *supra* note 181 at 3.

iv) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts effects them.

5) The party seeking to justify the limitation of a right bears the burden of justifying the limitation. In other words, the burden of displacing the general rule of openness lies on the party making the application.
6) All alternative and available options must be considered before a limit on openness is imposed.
7) A temporary shield (i.e. ban) will in some cases suffice; in others, a permanent protection is warranted.[203]
8) When balancing openness with privacy, a reasonable expectation of privacy must be taken into consideration.
9) Mere offence or embarrassment will not suffice for the exclusion of the public from the courtroom.
10) Exclusion from the courtroom (in camera hearings) should only be ordered where there are real and weighty reasons,
11) In determining when confidentiality outweighs the open courts principle, three factors are to be considered (drawing an analogy with solicitor-client privilege):
    i) is there a clear risk to an identifiable person or group of persons?
    ii) is there a risk of serious bodily harm or death?
    iii) is the danger imminent?
12) The must be a convincing evidentiary basis for issuing a ban.
13) A ban should be issued only when:
    i) the order is necessary in order to prevent a serious risk to the proper administration of justice.
    ii) the salutary effects of the ban outweigh the deleterious effects on the rights and interests of the parties and the public.
14) The threat of physical harm almost always warrants anonymity (which does not necessarily have to be permanent).

With regard to the publicity of court proceedings and records, the decision should be left to the discretion of the judge. Non-disclosure should only be justified if there is evidence that publicity could reasonably be expected to harm an individual, and the decision must also take into account the public interest in the

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[203] *Gannett Co., supra* note 30 (syllabus): The Court held that: "[…] any denial of access was only temporary; once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available."

administration of justice. This process will guarantee minimal impairment of the open courts principle and will provide enough flexibility to judges. This approach also insures that secrecy is not used for 'accommodating' or 'comforting' reasons.

Chapter VI. Recent Developments in the Judicial Management of Court Information in Canada – Canadian Judicial Council's 2005 Policy and Protocol

Faced with the problem discussed in Chapter IV, the courts seem to favor the elaboration of a 'FOIPP Guide' having similarities with what is found in the current legislation regulating public and private organizations but applicable to the administration of justice.

In September 2005, the Canadian Judicial Council approved a *Model Policy for Access to Court Records in Canada*.[204] This model policy was prepared by the Judges' Technology Advisory Committee ("JTAC") and in March 2005, the JTAC submitted a report titled "Use of Personal Information in Judgments and Recommended Protocol" which was approved by the Canadian Judicial Council.[205] These two documents propose to limit the current flow of information, mainly in the electronic network. The resulting danger is that by blocking one information channel, less information will be available, even in paper format.

In this section, I will (A) describe the developments which led to the adoption of the Protocol and Policy; (B) describe and analyze the protocol and policy that judges have adopted.

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[204] CJC, "Policy", *supra* note 21.

[205] CJC, "Protocol", *supra* note 20.

A. Development of the CJC's 2005 Protocol and Policy

1. 2002 Document

In March 2002, Chief Justice of the Supreme Court of British Columbia Donald J. Brenner and his Law Officer prepared a report for the Administration of Justice Committee of the Canadian Judicial Council. The report, entitled "Electronic Filing, Access to Court Records and Privacy"[206], was referred to the JTAC. This report provided the foundation for the discussion paper which followed in 2003.[207]

Chief Justice Brenner considered:

> Electronic filing and electronic access to court records will greatly increase the efficiency of the courts and the administration of justice. But the new technology will also alter the current balance between the need for open courts and the right of individual citizens to maintain the privacy of personal information. These impacts must be fully considered and protections put in place before systems are implemented.[208]

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[206] CJC, "Discussion", *supra* note 8 at 7.

[207] *Ibid.*

[208] Donald I. Brenner and Judith Hoffman, "Electronic Filing: Balancing Open Courts and Privacy", *Computer News for Judges*, No. 32, Spring 2002 at 7, online: <www.cjc-ccm.gc.ca>.

Chief Justice Brenner suggested any policy regarding electronic access must balance three basic values:

1. **Accountability**: The public has the right to observe the workings of the justice system and know how and why judicial decisions are made.[209]
2. **Privacy**: The privacy interests of litigants before the court.
3. **Access**: The right of citizens to have access to the courts to effectively resolve their disputes.[210]

He then enumerated different approaches that can be taken in developing a policy: hands off; take control; differential electronic access based on use; and differential access based on case type. [211] As previously explained in Chapter V, I favor the hands off approach. As we will see below, the CJC favored the three other approaches.

The author of the report also raised a number of questions to be addressed in a future electronic access policy.[212] In summary, the author is looking at the possibility of having different access depending on the format of the records.

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[209] See Stephen Colbran, 'Critique of "Open Justice" as a form of Judicial Accountability' (2003) 6(1) Legal Ethics 55. Dr. Stephen Colbran wrote a paper critiquing the concept of 'open justice' as a form of judicial accountability. He concludes that to maintain public confidence in the administration of justice it cannot be regarded as a system of performance evaluation. He suggests alternative strategies such as the analysis of judicial attributes and court and administrative performance measurement to evaluate judicial performance.

[210] Brenner, *supra* note 208 at 15.

[211] *Ibid.* at 15-17.

[212] *Ibid.* at 18:

"(a) What information will be contained in the electronic record?;
(b) What form will the electronic record be in?;

Chief Justice Brenner's paper was only the beginning of a series of reports, discussion papers and submissions prepared for the Canadian Judicial Council.

2. 2003 – Discussion Paper

In May 2003 the JTAC submitted its Discussion Paper entitled *Open Courts, Electronic Access to Court Records, and Privacy* wherein it presented 33 conclusions. The first five conclusions under the heading "Access to Court Proceedings, Court Records and Docket Information in Canada" recognized that the right of the public to open court is an important constitutional rule and that the right to open courts generally outweighs the right to privacy, but it is noted that there is a disagreement about the nature of the exemptions to the general rule of openness. Conclusions 6 to 9 dealt with the status of E-Access to court records, docket information and judgment in Canada. Conclusions 10 to 23 dealt with policy issues. The "responsibility for establishing E-Access policies", "the purpose for which court records are filed and docket information is prepared", "the contents of the court file", and "who is entitled to access?" are examples of topics covered. For example, conclusion 19 reads as follows:

(c) Who can access the electronic record?; and,
(d) What uses of the electronic information accessed will be permitted?"

Is there information in the court file which is unnecessary for the purpose for which the court record is provided? :
19. Statutes and rules of procedures which mandate the contents of documents ought to be examined to: (a) identify mandated forms which require early or excessive personal identifiers; (b) propose amendments to the forms to remove the need for the personal identifiers, postpone the filing of the personal identifiers until a disposition is sought, and or direct the filing of personal identifiers in a manner which would segregate it from the court file to which public access is given. (underlining added)

The last conclusions, 24 through 33, deal with logistical issues such as "accuracy of the public and non-public court file", "remote access or on-site access", "track users of E-access" and "retroactive of prospective application of the E-Access policy". On "remote access" the conclusions are:

27. It may become necessary to differentiate between remote public access and on-site access.
28. In any event, on-site electronic access will be essential to ensure equality of treatment of various segments of the public.

The JTAC recognized no court in Canada is currently providing electronic access to court records and that electronic access to docket information is varied.[213] The JTAC found there is disagreement about the nature of the exemptions to the general rule of openness,[214] and was also of the opinion that access policies ought to be established before access is afforded.[215] Interestingly, I note the first

[213] CJC, "Discussion", *supra* note 8 at conclusions 6 and 7.

[214] *Ibid.* at conclusion 4.

[215] *Ibid.* at conclusion 8.

conclusion qualified the right of the public to open courts as an important constitutional rule. The second conclusion stated the right of an individual to privacy is a fundamental value, and in its third conclusion, the JTAC stated the right of open courts generally outweighs the right to privacy.[216]

3. 2003-2004 Consultations

a) Law Society of Upper Canada

JTAC's discussion paper was circulated for comments and submissions. The same year, the Law Society of Upper Canada Task Force on Electronic Access to Court Records reviewed the discussion paper prepared by JTAC.[217] In its submission, the Law Society clearly stated it endorses the primacy of the right to open courts over the right to privacy and court records should be presumed to be public unless there is a valid reason for restricting access.[218] However, in the same breath, the Law Society also recognized "that exceptions to the general rule will be necessary to protect legitimate privacy interests."[219]

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[216] *Ibid.* at conclusions 1, 2 and 3.

[217] The Law Society of Upper Canada, *Report to Convocation*, Task Force on Electronic Access to Court Records, Policy Secretariat, November 27, 2003, online: <www.lsuc.on.ca/news/pdf/convnov03_reprt_convocation_open_courts.pdf>.

[218] *Ibid.* at para. 2.

[219] *Ibid.*

The Law Society supported the widest access for judgments and orders, and states that only in unusual circumstances should access be restricted.[220] The Law Society noted that "although most files are in theory accessible now, access is in fact limited by the requirement to attend at the court office and request the paper file."[221] The Law Society was concerned "if files are to be searchable on-line from remote locations, it would permit 'fishing expeditions' that are not now possible."[222] For 'sensitive material' (such as psychiatric reports or reports of sexual abuse), the Law Society proposed the electronic file could indicate that a document exists, without disclosing its contents. Only those with a valid interest would be able to apply to receive the contents of the document. For the Law Society, "this approach would maintain the principle of openness without unnecessarily violating the privacy of innocent persons."[223]

b) Canadian Newspaper Association

The Canadian Newspaper Association ("CNA") made its submission to CJC in January 2004. The submission contains suggestions which CNA believed will strike a balance between the competing interests of the right of the public to

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[220] *Ibid.* at para. 8.

[221] *Ibid.* at para. 10.

[222] *Ibid.*

[223] *Ibid.* at para. 12.

transparency in the administration of justice and the right of an individual to privacy. For the CNA the "policy rationale behind the supremacy of the "open courts" principle is that the public must be able to scrutinize the court system."[224] CNA noted that "the main difference between paper and electronic records is the "practical obscurity" of paper records on the one hand, and the easy accessibility of electronic records, on the other."[225] CNA submitted that "by gaining E-access, greater transparency and equal public access will be possible."[226]

c) Canadian Bar Association

In response to JTAC's discussion paper, the Canadian Bar Association ("CBA") presented the issue as a balancing of competing values: "The subject of electronic access to court records involves two important Canadian values: the right to the public to transparency in the administration of justice, and the right of individuals to privacy."[227] The CBA noted that "electronic access to court records may be a controversial and developing issue, but information now publicly accessible through the paper medium should not become less so as a result of the

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[224] Canadian Newspaper Association, *Submission: Open Courts, Electronic Access to Court Records, and Privacy*, January 22, 2004, at 3-5, online: <www.cna-acj.ca/CNA/CNA.nsf/PrinterFriendly/PolicyEAccess?OpenDocument>.

[225] *Ibid.*

[226] *Ibid.*

[227] *Ibid.* at 2.

development of policy and regulations affecting electronic access."[228] For the CBA, "the overriding principle should be that the entire contents of the court record are available to the public, unless a specific judicial order has been made that seals all or part of the court file, or a statute prohibits access."[229] The CBA went on to list potential risks of electronic access, such as extensive "bulk" searches, use of information for criminal purposes and the impact on access to justice.[230]

B. The Canadian Judicial Council Products – 2005 Protocol and Policy

The CJC was concerned with the disclosure of personal information, or personal data identifiers. The 2005 Protocol deals with 'personal information' included in the judgments, while the 2005 Policy deals with 'personal information' included in all sorts of documents filed or created and which will be part of the court record. CJC's approach applies throughout the proceedings and its scope reaches all court records. The Protocol and the Policy use the same definitions.

I will describe and underline the principal impact the CJC 2005 Policy and Protocol will have on the management of court information.

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[228] Canadian Bar Association, *supra* note 19 at 4.

[229] *Ibid.* at 5.

[230] *Ibid.* at 8.

1. Use of Personal Information in Judgments and Recommended Protocol

In March 2005, the CJC approved JTAC's *Use of Personal Information in Judgments and Recommended Protocol*. This Protocol, drafted by the JTAC Open Courts and E-Access to Court Records and Privacy Subcommittee, recommended "that the ultimate responsibility to ensure that reasons for judgment comply with publication bans and non-disclosure provisions should rest with the judge drafting the decision."[231] On the desirability of placing all judgments on the Internet, the sub-committee was not able to come to a unanimous view. It recommended that courts be encouraged to post all of their written judgments on their own court websites or make them available to other publicly accessible sites.[232] The majority of the sub-committee held the view that privacy concerns associated with publicity are outweighed by the benefits of facilitating open access to the decisions of the court and that any adverse impacts on the privacy of justice system participants can be significantly reduced by following the

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[231] CJC, "Protocol", supra note 20 at para. 9. In October 2004, the CJC adopted a Model Protocol for Court Technology Committees. Part of the mandate of these committees is:

> "to consider and advise the Chief Justice on other technology initiatives JTAC develops from time to time. Current initiatives include: the Report on Electronic Access to Court Records and Privacy; the Guidelines for the Uniform Preparation of Judgments; electronic evidence standards; anonymization of parties and others reasons of decision; uniform reporting in reasons for decision of publication bans."

[232] *Ibid.* at para. 13.

guidelines set out in a Protocol.[233] Recognizing the principle of open justice is a cornerstone of our judicial system, the sub-committee felt the wide dissemination of decisions by the courts over the internet has raised new privacy concerns that must now be addressed by courts and the judges.[234] The sub-committee noted "reasons for judgment in any type of proceeding before the court can contain personal information about parties to the litigation, witnesses, or third parties with some connection to the proceedings." It also noted "beyond the restrictions imposed by legislative and common law publication bans, some have begun to question the need to disseminate sensitive personal information in judgments which are posted on the internet."[235] The Protocol has been developed with an understanding that courts must be concerned with protecting "the privacy of litigants or other participants in the proceedings."[236]

The Protocol's five main objectives are: "to encourage consistency in the way judgments are drafted when publication bans apply or then privacy interests of the parties and other involved in proceedings should be protected; to encourage the publication of all the decisions on the internet; to reconsider the necessity to exclude certain classes of cases from internet publication; to assist judges in

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[233] *Ibid.*

[234] *Ibid.* at para. 16.

[235] *Ibid.*

[236] *Ibid.* at para. 19.

striking a balance between protecting the privacy of litigants in appropriate cases and fostering an open judicial system when drafting reasons for judgment; and to establish some basic types of cases where individual identities or factual information needs to be protected and suggests what types of information should be removed."[237] Taken together, the results of these five objectives equate to even more limitations on information currently available to the public.

The sub-committee identified four objectives which must be taken into account when determining what information should be included or omitted from reasons for judgment: ensuring full compliance with the law; fostering an open and accountable judicial system; protecting the privacy of justice system participants where appropriate; and maintaining the readability of reasons for judgment.[238] My solution as explained in Chapter V provides a more comprehensible approach. In the Protocol, it is not at all clear what the expectations of privacy of justice system participants are. Some clues may be found in the three levels of protection proposed in the Protocol[239]:

A. Personal Data Identifiers: omitting personal data identifiers which by their very nature are fundamental to an individual's right to privacy;[240]

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[237] *Ibid.* at paras. 18-19.

[238] *Ibid.* at para. 19.

[239] *Ibid.* at para. 21.

[240] *Ibid.* at para. 23. The Protocol provides that personal data identifier information "is susceptible to misuse and, when connected with a person's name, could be used to perpetrate identity theft

B. Legal Prohibitions on Publication: omitting information which, if published, could disclose the identity of certain participants in the judicial proceeding in violation of a statutory or common law restriction on publication, and
C. Discretionary Protection of Privacy Rights: omitting other personal information to prevent the identification of parties where the circumstances are such that the dissemination of this information over the internet could harm innocent persons or subvert the course of justice.

The 2005 Protocol contains a detailed description of what information should be left out of the judgment under specific levels of protection. For example, the sub-committee suggested "avoiding personal data, personal acquaintances' information and specific factual information will generally be sufficient to prevent the disclosure of the identity of the person sought to be protected by the ban."[241] The reason provided for not including the name of the individual in the definition is that the risk usually occurs when the name is associated with personal data identifiers[242]: day and month of birth; addresses (e.g. civic, postal or e-mail);

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especially if such information is easily accessible over the internet. Individuals have the right to the privacy of this information and to be protected against identity theft. Except in cases where identification is an issue, there is rarely any reason to include this type of information in a decision. As such, this type of information should generally be omitted from all reasons for judgment. If it is necessary to include a personal data identifier, consideration should be given to removing some of the information to obscure the full identifier."

[241] *Ibid.* at para. 26.

[242] *Ibid.* at para. 22: "The first level of protection proposed in the CJC's protocol relates to information, other than a person's name, which serves as part of an individual's legal identity. This type of information is typically referred to as personal data identifiers and includes:

- day and month of birth;
- social insurance numbers;
- credit card numbers; and
- financial account numbers (banks, investments etc.)."

unique numbers (e.g. phone; social insurance; financial accounts); and biometrical information (e.g. fingerprints, facial image). Depending upon the context, certain personal information is considered private and other personal information is considered public.

Although the Protocol discusses the availability of judgments on the Internet, the proposed level of protection is applicable to all judgments in any format. Hence, because of the technology (Internet) which facilitates the circulation of information, it is proposed the amount of information available to the public in judgments be limited.

2. Model Policy for Access to Court Records in Canada

In September 2005, at the Canadian Institute for the Administration of Justice annual conference, "Technology, Privacy and Justice", the CJC unveiled its *Model Policy for Access to Court Records in Canada* prepared by the JTAC. In the executive summary, the JTAC stated:

> this policy endorses the principle of openness and retains the existing presumption that all court records are available to the public at the courthouse. When technically feasible, the public is also entitled to remote access to judgments and most docket information. This policy does not endorse remote public access to all court records, although individual courts

> may decide to provide remote public access to some categories of documents where the risks of misuse are low.[243] (underlining added)

The Policy seeks to reflect the consensus that emerged from the responses to the Discussion Paper and place that consensus within a principled framework.[244] The Committee mentioned "new information technologies have the potential to significantly enhance access to court records but at the same time, such technologies threaten to undermine the 'practical obscurity' of traditional paper-based records which has provided a kind of *de facto* protection for values such as privacy and security."[245] The Policy is built upon the following principled framework:

(a) the open courts principle is a fundamental constitutional principle and should be enabled through the use of new information technologies;
(b) restrictions on access to court records only be justified where:
    i. such restrictions are needed to address serious risks to individual privacy and security rights, or other important interests such as the proper administration of justice;
    ii. such restrictions are carefully tailored so that the impact on the open courts principle is as minimal as possible; and
    iii. the benefits of the restrictions outweigh their negative effects on the open courts principle, taking into account the availability of this information through other means, the desirability of facilitating access for purposes strongly connected to the open courts principle, and the need to

[243] CJC, "Policy", *supra* note 21 at iii.

[244] *Ibid.* at para. 17.

[245] *Ibid.* at para. 18.

> avoid facilitating access for purposes that are not connected to the open courts principle.[246]

As stated by the Council, the purpose of this Policy is not to state legal rules governing access to court records, but rather to provide courts with a framework to deal with new concerns and sensitive issues raised by the availability of new information technologies that allow for unprecedented access to court information.[247] The Council could not omit saying this Policy is not the result of a consensus. The principle is perceived by some as a threat to personal privacy.

The scope of the Policy is fairly wide. As stated: "The policy sets out the principles governing the public's access to court records. It is not intended to apply to the availability of court records to the judiciary and court personnel."[248]

The Policy provides a list of definitions for specific terms such as "access", "parties", "court record", "personal data identifiers", "personal information" and "remote access", to name those few. But more importantly, in the Policy, the CJC

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[246] *Ibid.* at para. 21. Excerpt from the Policy: In summary, this policy endorses the principle of openness and retains the existing presumption that all court records are available to the public at the courthouse. When technically feasible, the public is also entitled to remote access to judgments and most docket information. This policy does not endorse remote public access to all other court records, although individual courts may decide to provide remote public access to some categories of documents where the risks of misuse are low. In addition, users may enter into an access agreement with the court in order to get remote access to court records, including bulk access. Finally, this policy develops many of the further elements of an access policy, including provisions relating to the creation, storage and destruction of court records.

[247] *Ibid.* at para. 22.

[248] *Ibid.* at cl. 1.2.

build on the Protocol to extend the 'privacy protection' to all documents. It defines some specific terms and discusses the need for the information to remain confidential:

> "Personal data identifiers" refers to personal information that, when combined together or with the name of an individual, enables the direct identification of this individual so as to pose a serious threat to this individual's personal security. This information includes:
>
> a) day and month of birth;
> b) addresses (e.g. civic, postal or e-mail);
> c) unique numbers (e.g. phone, social insurance, financial accounts); and
> d) biometrical information (e.g. fingerprints, facial image).
>
> "Personal data identifiers" does not include a person's name.

In the discussion supporting the definition, it is stated "Personal data identifiers are the subset of personal information that is the most important and valuable for any individual, since they are used by institutions to authenticate a person's identity, apart from an individual's name. Personal data identifiers also typically allow direct contact with an individual. Unrestricted public access to this type of personal information would entail serious threats to personal security, such as identity theft, stalking and harassment, and the foreseeable uses of this information are not likely to be connected with the purposes for which court records are made public."[249]

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[249] *Ibid.* at 6.

The Policy includes directives with regard to information management: the creation of, storage of, fees for, and access to court information. It not only addresses electronic access, it proposes a framework applicable to all documents under the control of the court's administrations. Through this Policy, CJC stated that "when parties prepare pleadings, indictments and other documents that are intended to be part of the case file, they are responsible for limiting the disclosure of personal data identifiers and other personal information to what is necessary for the disposition of the case."[250]

The test used to limit disclosure of information is based on 'necessity' and addresses:

> 2.1 Inclusion of Personal Information
> Rules that govern the filing of documents in the court record shall prohibit the inclusion of unnecessary personal data identifiers and other personal information in the court record. Such information shall be included only when required for the disposition of the case and, when possible, only at the moment this information needs to be part of the court record.
>
> 2.2 Responsibilities of the Parties
> When the parties prepare pleadings, indictments and other documents that are intended to be part of the case file, they are responsible for limiting the disclosure of personal data identifiers and other personal information to what is necessary for the disposition of the case.
>
> 2.3 Responsibilities of the Judiciary
> When judges and judicial officers draft their judgments and, more generally, when court staff prepare documents intended to be part of the case file, they are responsible for avoiding the disclosure of personal data identifiers and

[250] *Ibid.* at 98: Clause 2 – Creation, 2.2 Responsibilities of the Parties.

> limiting the disclosure of personal information to what is necessary and relevant for the purposes of the document.

As we see in the above excerpt, the decision not to include information is left to the individual creating the document: the parties; the court officers; or the judge. In the discussion supporting this position, it is written

> The access policy must prevent the inclusion of unnecessary personal data identifiers and other personal information when the court record is created in order to reduce the amount of personal information that will have to be stored and potentially made accessible to the public. The policy must also clearly outline the responsibilities of those who prepare documents that will be included in the court record.
> With regard to the disclosure of "personal data identifiers" as defined in this model policy, the requirements for pleadings prepared by the parties are less strict than those for documents prepared by the court. There are two major reasons for this. First, personal data identifiers are less likely to be relevant for the purposes of the judgments than they are for the filing requirements of pleadings or indictments. Second, unlike documents filed by the parties, judgments are much more likely to be published in case law reports and databases, so the inclusion of personal data identifiers in these documents would constitute a much higher risk for the personal safety of participants in judicial proceedings.
> The onus of limiting personal information in the court record rests on the persons who draft or prepare documents that are intended to be part of this record, as these persons are in the best position to be aware of the presence of such information. Judges drafting judgments should follow the above-mentioned document from the Canadian Judicial.[251]

The test proposed in this Policy is one of necessity. The person creating or preparing documents that are to be part of a court record is also the one responsible for limiting the amount and detail of personal information/identifiers to that which is necessary. For the documents initially filed in the records, it

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[251] *Ibid.*

seems the decision is left to the parties. For the information included in the court docket, the decision seems to be left to the court administrators, and for the information included in the judgments, the decision is left to the judge. Hence, the obligation (or duty) to limit disclosure rests not only on judges but also on the parties and court staff.

Chapter VII. Evaluation of the Canadian Judicial Council's Policy and Protocol

My solution is similar to the CJC's Protocol and Policy in that both recognize the importance of the open court principle; however my solution differs as follows. Instead of proposing a one-size-fits-all solution, I provide an approach which provides flexibility and based on the current day to day business of the courts. My solution also moves away from pre-determined categories of information that would be exempt from disclosure; I argue that all information is public unless otherwise demonstrated. Furthermore, these exemptions are to be revisited periodically, as some information becomes less 'sensitive' as time passes.

I will now evaluate the CJC's documents in light of my solution described in Chapter V. I have identified a series of problems with the Protocol and Policy, which can be listed in two main categories; (A) technical problems; and (B) errors of principle.

A. Technical Problems

Pursuant to the CJC's Policy, the duty to limit disclosure of information falls not only on judges, but also on parties and court staff. This shared duty creates a number of problems are discussed below.

1. Who Determines Whether Information is Severed/Deleted/Not Disclosed?

Who will perform the necessity test? It is unlikely the applicant can be responsible for protecting the privacy of the respondent's personal information. The CJC did not provide any guidance about who is allowed to censor or alter the documentary evidence and one of the major problems I have identified is evidentiary tempering. If a party decides to file severed documents or 'modified' documents to protect some sort of privacy, this will lead to delay in the judicial process and additional litigation. With the CJC's documents, we are left with a series of questions:

- What problems arise from the parties making this sort of determination?
- If parties are to make the determination, how will we determine if all the evidence has properly been filed before the court?
- On which criteria will the parties base their evaluation of what is 'necessary' or not?
- If the parties are not responsible to perform the test then should it be left to the court staff?
- If the staff is to perform the necessity test what will be the safeguards?

The Protocol and Policy do not provide any answers to these questions.

2. How is the Decision to Limit Openness Reviewed?

My concern is that the CJC is proposing a secret process, a process that is outside the current procedure respecting publication bans and other currently recognized non-disclosure orders. If the CJC's Policy is preferred, then procedures will have to be developed to provide for a review process in cases where information is not disclosed in final judgments or in court records. In other words, there is a need for processes that will compensate for information short-falls. Who will call for the review? There is no provision for the public (non-parties) to have any standing to intervene. What court will hear reviews? According to what principles?

In summary, the 2005 Protocol and Policy provide courts with guidelines and a framework to help deal with new technologies. There is no discussion regarding a potential review of the decision not to include information. The subjective evaluation of the necessity to include or not include information is left with the parties, court staff and the judge.

3. The "Necessity" Criterion

Presently, the 'necessity' criterion is too vague. (In the current context, I am not referring to the "doctrine of vagueness" discussed in *R. v. Nova Scotia*

Pharmaceutical Society[252].) Pragmatically speaking, the necessity criterion is not useful because as it stands, one individual may deem it necessary to have access to a particular piece of personal information while another individual may not see the necessity. This can only complicate and lengthen the judicial proceedings by creating additional layers, decisions and administrative burdens to request access. If to be effective, one 'decision maker' is identified, there is still a need for representations from interested parties.

Although the Policy stated "[m]embers of the public have presumptive right of access to all court records"[253] and some documents shall be presumptively accessible (on-site and/or remote access – e.g. judgments, docket information and information in court records) until the necessity criterion is defined, the Policy can be interpreted subjectively. One court administrator may choose to be secretive (i.e. 'be careful, you don't want to disclose too much, because it is not necessary') while another may give carte blanche to all documents.

Two contexts are relevant and should be taken into account, situations governed by a legal rule limiting disclosure of information (e.g. publication bans), and other

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[252] *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606: "The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion." "[…] a law will be found unconstitutionally vague if it lacks in precision as not to give sufficient guidance for legal debate – that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria."

[253] CJC, "Policy", *supra* note 21 at cl. 4.1.

situations. However, the same basic approach is applied to both; do not disclose more information than is necessary for judicial purposes:

> In the judicial context, the level of personal information that is considered public is a function of what information is required for the disposition of a case, subject to any applicable disclosure restrictions. Unless a record is sealed or is the subject of a publication ban, individuals are usually not protected from being named in judicial proceedings. Their other personal information is not usually protected either. However, since every individual has at least some interest in protecting his or her personal information, an access policy to court records should limit the level of personal information found in court records to that required for the disposition of a case.[254]

This 'test of necessity' is based on very subjective standards. The person responsible for making the determination may be persuaded or coerced to 'omit' personal or 'sensitive' information for interests other than those of justice. If any process is put in place, this process must be open and reviewable. The simple 'necessity test' does not guarantee personal integrity, unerring judgment, or even good intentions.

B. Errors of Principle

1. The CJC Operates With an Ill-Defined Notion of Privacy.

By not codifying/classifying what is meant by "privacy", the Policy will serve more to create confusion than to create policy. Protection of privacy is only one

[254] *Ibid.*

issue when put into the context of the entire judicial process. In addition, the problems identified by the Policy are based on speculation as, again, the Policy does not really define what 'privacy' is. It may be impossible to precisely define privacy, hence the reliance on some specific examples that do not always encompass the reality, but the CJC could have relied on the judicial notion of privacy which is the result of all the current rules, principles and practices. Still, I argue that this would not have allowed for enough flexibility.

It may prove problematic to take privacy approaches valid in one area (citizenry vs. State intrusions) and apply them in another area (disclosure of identifying information respecting litigants). As mentioned above[255], the context of disclosure is important and must be taken into consideration. We must not use concepts that are not suited for the administration of justice. Fair information principles and consent are concepts not suited for court information because personal information disclosed for justice purposes will lead to a decision that is enforceable by State Power (e.g. an individual will have to go to jail; an individual will have to pay compensation or his property will be seized).

[255] See above "2. Individual Model versus Community Model".

2. Generalized Rules Versus Case-by-Case Approach

The CJC tries to create general rules, rather than permitting case-by-case assessments based on identified clear criteria. The manner in which the 2005 Policy and Protocol are worded opens the door to negative impacts on the administration of justice, which is exactly the problem with administrative guidelines designed to catch and solve all factual situations. Our justice system is already effective in addressing problems on a case-by-case basis. Judges have always efficiently balanced openness and confidentiality in matters before the courts. I am of the opinion that the discretion of the court should not be framed by some administrative document, but by precedent and tradition, as it should be in a common law system.

3. Speculative Consequences

The Protocol is based on assertions of probable 'misuse' and potential criminal appropriations of personal information. Of all these 'bad results' (i.e. concerns with new forms of access) it is the 'mistrust' which most directly affects the open court principle. Practical obscurity has served as the default protection against all the potential harms that are now raised to limit access and circulation of court information over the internet. I have already discussed the speculative risks above.

4. Types of Information That May be Censored

Trudel noted that the foundations of the legislation on protection of personal information have been little debated.[256] For Trudel, "it is primarily the result of a movement conveying concern about the perils of centralized computing, and has taken the form of a kind of defence against surveillance by government authorities."[257] Trudel explained that:

> in order to circumvent the difficulty of identifying what should remain secret in the name of the right to privacy, we have opted for a notion that confuses "information that identifies a person" with "privacy information." Thus, in the name of privacy protection, a set of rules has been established that target not information on private life, but all information that could identify an individual.[258]

An all-embracing notion of personal information is not the solution, explained Trudel, who also noted that "the legitimacy associated with privacy protection and human dignity has been used to justify mechanisms that do not always concord with the balance that has to exist among the various rights brought into play by circulation of information."[259] Trudel stated that "we cannot continue living

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[256] Trudel, *supra* note 115 at 2.

[257] *Ibid.*

[258] *Ibid.* at 3-4.

[259] *Ibid.*

indefinitely with the fears of a time when all technology use was associated with the misuses that could be made of it. Such poorly designed measures could weaken privacy protection."[260] Trudel sees a slide from privacy to personal life:

> Many uses of personal information do not violate privacy. Privacy is a weak justification for taking measures with respect to information that must circulate in society. This is probably why some people have resorted to an extremely vague notion with an as yet undetermined scope: the notion of personal life. This notion seems to result from an attempt to resolve conceptual difficulties from the fragility of the foundations of controls on personal information that is not related to privacy.[261]
> [...]
> The result is a stream of demands that looks like a general quest for a veto over all information on individuals, including information the disclosure of which was not long ago seen as one of the normal inconveniences of living in society. For example, the right not to receive advertising or email solicitation has been invoked. Fear of such annoyances is partly justified and leads to demands to establish controls over all kinds of situations in which personal information is concerned. In many ways, the demands to strengthen personal data protection have sometimes become demands not for privacy protection but for protection from the inconvenience inherent to living in society. This approach is incompatible with the requirements of a democratic society because it prevents the exercise of other basic rights, such as freedom of expression and accountability.[262]

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[260] *Ibid.* at 5.

[261] *Ibid.* at 7.

[262] *Ibid.* at 8. See also Solove, *supra* note 64 at 1177-1178. Solove explained that "one of the longstanding conceptions of privacy is that it involves secrecy and is lost once information is disclosed." He called it the "secrecy paradigm."

> "According to this paradigm, an invasion of privacy consists of concealed information being unveiled or released in some way to others. Another central form of invasion is being watched or listened to both surreptitiously or in the open. The harms cause by these invasions of privacy are self-censorship and reputational damage. This paradigm is so embedded in our privacy discourse that privacy is often represented visually by a roving eye, an open keyhole, and a person peeking through Venetian blinds."

According to Solove

> "The existence of the information in the public domain, or the existence of a vantage point from which the public can have perceptual assess to information can no longer be controlling for whether a person has a claim that the information is private. The possession

In summary, there is no need for a 'judicial privacy' policy because as demonstrated above, the CJC Policy is practically unworkable. It creates the danger of non-disclosure of important information.

The judiciary should not seek to create FOIPP legislation for itself. One reason the judiciary is not covered by FOIPP is that it already operates under freedom of information and protection of privacy doctrines; further overlay is unnecessary. All that is necessary is for the judiciary to continue to apply the doctrines that have governed to this point (e.g. open courts principle; publication bans; sealing orders; anonymization applications). The judicial system should rely on the parties to make the application they think is appropriate – a bottom up solution, rather than a top-down solution.

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of personal data by others should also not extinguish a privacy interest in that data. In the Information Age, such an outmoded view would spell the practical extinction of privacy. Unless we live as hermits, there is no way to exist in modern society without leaving information traces wherever we go. [...] Privacy involves the accessibility of information, not just whether it is secret. In order to protect privacy in the Information Age, we must abandon the secrecy paradigm. Privacy is an expectation in a certain degree of accessibility."

Chapter VIII. Conclusion

A great principle of our system of justice, the open courts principle, which has been a part of the judicial tradition for centuries, is now being questioned because of the advent of new technology. The advancement of technology, particularly the Internet, has allowed or has the potential to allow the information contained in court records to move from practical obscurity to greater openness. Greater public access to information contained in court records will lead to the full democratization of our judicial institutions.

Some practitioners and academics have advanced the theory that this greater access poses serious threats to personal privacy of parties, witnesses or any other individuals involved in judicial proceedings. Advocates for greater protection of personal information demand policies that will guide the court's administrations in the disclosure of personal information. By differentiating between paper access at the courthouse and remote access via Internet, these advocates speculate the protection offered by practical obscurity will disappear. I conclude that if public access is the guiding principle to the open courts principle then the format used to gain access should not be taken into consideration. I am also of the opinion that practical obscurity offers a false sense of protection, as any individuals or organizations with adequate resources, time, and/or determination still have the means to obtain the desired information.

Policies and guidelines based on necessity are not adequate for a judicial forum. For some members of the public, there may be an unforeseen necessity, and necessity may prove to be a very contentious topic. To remove wide categories of information from access because they are not seen as necessary is not the solution. In addition, the purposes for which the open courts principle exists are also the purposes mentioned to prevent disclosure. It is stated that disclosure of personal information does not serve the principle's purposes, accountability and transparency, but this position ignores the need for a healthy flow of information in the judicial system and in the society. By combining necessity and purpose we are limiting the flow of personal information as never before.

I am of the opinion these policies are flawed. Judges should be allowed to fulfill their role in the judicial process. Starting with the premise that all information must be made public, only a judge, upon motion from an interested party, should have the discretionary power to prevent the disclosure of personal information if the demonstration is made that this disclosure will prove to be harmful.

What is proposed in the 2005 Protocol and Policy is indefinite confidentiality of specific information to protect the privacy of individuals. The proposed CJC Policy, as presently worded, does not allow enough flexibility to facilitate openness; there should be an actual finding of harm based on a reasoned

approach, not an automatic confidentiality based on possible apocalyptic scenarios. By adopting the Policy and the Protocol, CJC may be oversimplifying the issues around openness of the court records. Even if the complexity is real, our concern must be that justice is done and seen to be done. New technologies should not be determinant in discussions around the open courts principle; new technologies are merely updates of the tools available for the citizenry to access information. They are not a new threat to privacy. In a faster moving, smaller world, they simply make access quicker and easier. One major change is that new technology allows enhanced searches that previously would have been done slowly and at high cost. In other words, the quality of access has been greatly improved. What is troubling is that the Protocol and Policy fully recognize the importance of the principle, but still propose unprecedented limitations to the inclusion of information that was always previously available in judgments, court records and dockets.

This fear is directed more towards the linkages or the search capabilities offered by the new technology then the publicity of the information itself. The perceived need for this ban on the free flow of information seems to be based on fear of technology, loss of control, the feeling of being 'left behind', apocalyptic scenarios, and fear of the information being misused. The Internet is still only the written word. We have not lost control, only gained better access. The vast modern and technologically advanced cities and countries of the world are

inextricably linked; we are all residents of a Global Village and people must adapt and understand that their actions and personal information cannot always remain private when entering a public forum.

Practical obscurity is not the solution for protection. Private information can still be protected, but when one seeks justice before public courts, personal information becomes available to the public. This does not justify or allow identity theft. To illustrate my point, I would say that because I do not wear a bullet proof vest does not mean I am negligent or that any individual is justified in shooting me. The same is true of information. A few years ago the issue was cameras in courtrooms. During the 1994 National Conference on Open Justice, tradition came under attack because courts were apparently afraid of what technology, in the form of cameras, would reveal within the courtroom.[263] In the 1990's, televised proceedings became an important issue for the courts, and while this issue is far from being settled, an additional, potentially even more complex,

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[263] The *Code of Civil Procedure*, c. C-25, s. 47. Section 13 provides that "The sittings of the courts are public wherever they may be held, but the court may order that they be held in camera in the interests of good morals or public order. However, in family matters, sittings in first instance are held in camera, unless the court, upon application, orders that, in the interests of justice, a sitting be public. Any journalist who proves his capacity is admitted to sittings held in camera, without further formality, unless the court consider his presence detrimental to a person whose interests may be affected by the proceedings.[…]"
Rules of Practice of the Court of Québec (civil division), c. C-25, r.4. Section 12: Anything that interferes with the decorum and good order of the court is prohibited. The following, among other things, is prohibited: […] practice of photography or cinematography, making of audio or video recording, radio broadcasting, television broadcasting […] Except in the Youth Division, audio recordings made by the media of the arguments and decision are authorized unless the judge decides otherwise; however, the broadcasting of such recordings is prohibited.
A similar text is found in the *Rules of Practice of the Superior Court of Quebec in civil matters*, c. C-25, r. 8, s. 38. A similar text is also found in the *Rules of Practice of the Superior Court in criminal matters*, C-46 – SI/2002-46 (http://lois.justice.gc.ca/fr/C-46/TR-2002-46/texte.html).

issue through Internet broadcasts has arisen, one which will pose potential threats to the privacy of individuals involved in the judicial process. It must be noted, however, that the proceedings of the Supreme Court of Canada are taped and then aired on the Cable Public Affairs Channel (CPAC). It is even possible to obtain a copy of the transcript or a copy of the video.[264] Years from now, the brouhaha over the Internet might seem trivial when faced with newer and even more complex technological developments. The open court principle and the time honored practice of relying on the discretion of judges has been and will be proven most the effective way of protecting individuals' various interests.

[264] Barbara Kincaid, "Use of Technology at the Supreme Court of Canada" (presentation to the ACCA 2003 Conference, Sept. 16, 2003), online: <www.cfcj-fcjc.org/docs/use%20of%20technology%20at%20the%20SCC.pdf); (www.scc-csc.gc.ca/faq/faq/index_e.asp#f7>.

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